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No. 94 818

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HERCULES INCORPORATED

and

WM. T. THOMPSON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Judge Plager, in dissenting from the opinion issued by the court of appeals, stated the question as starkly as possible:

> If the government compels manufacture of a product by private companies, a product known to the government to be potentially dangerous, and the use by the government of the product causes the manufacturers to incur liability, may the government claim immunity from the consequences of its conduct?

(App. 34a-35a).

Subsumed within this larger question are two distinct issues of law which should be addressed by this Court:

1. Whether the government contractor defense to *tort claims* created by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), precludes *breach of contract claims* against the United States that otherwise are permissible in accordance with *United States v. Spearin*, 248 U.S. 132 (1918).

2. Whether the government may compel government contractors to produce hazardous products (such as Agent Orange) pursuant to the Defense Production Act, and then avoid all contractual liability for damages suffered by the contractors when they subsequently are sued in tort actions by third parties allegedly harmed by these products.

PARTIES TO PROCEEDING BELOW

All of the parties are listed in the caption. Pursuant to Rule 29.1, Petitioners make the following disclosures:

1. Hercules Incorporated has no parent company and has no subsidiaries or affiliates that are publicly traded.

2. Wm. T. Thompson Company has no parent company and has no subsidiaries or affiliates that are publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Hercules Incorporated ("Hercules") and Wm. T. Thompson Company ("Thompson") hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered on May 4, 1994, in the consolidated appeals of *Hercules Incorporated v. The United States* and *Wm. T. Thompson Company v. The United States.*

OPINIONS BELOW

The opinion of the United States Court of Federal Claims (then the United States Claims Court) granting the United States' motion for summary judgment against

Hercules (App. 47a-80a)[1] is reported at 25 Cl. Ct. 616. The opinion of that same court granting the United States' motion for summary judgment against Thompson (App. 82a-115a) is reported at 26 Cl. Ct. 17. The divided opinion of the United States Court of Appeals for the Federal Circuit affirming the Claims Court (App. 1a-46a) is reported at 24 F.3d 188.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1994. Rehearing was denied on July 14, 1994. (App. 117a-121a). On September 26, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari until November 4, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 707 of the Defense Production Act, as amended, 50 U.S.C. § 2157, provides as follows:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act.

STATEMENT OF THE CASE

A. The Compelled Production of Agent Orange

This case involves the most recent chapter in the long story surrounding the United States' use of a defoliant known as Agent Orange during the Vietnam War.[2] Petitioners are two chemical companies which, during the 1960's, were compelled by the United States under the authority of the Defense Production Act, 50 U.S.C.

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[1] All citations to "App. ——" refer to the Appendix filed contemporaneously herewith pursuant to United States Supreme Court Rule 14(k).

[2] For a thorough and insightful telling of this story, *see* Peter H. Schuck, *Agent Orange on Trial* (enlarged ed. 1987).

§§ 2061, *et seq.*, to produce and sell Agent Orange to the Department of Defense. (Jt. App. 0097-0098).[3] While Hercules and Thompson had some experience in producing herbicides for commercial use, neither company had ever produced defoliants and neither company had any knowledge of the hazards, if any, that might accompany the military use of such defoliants. (Jt. App. 0544, 0546-0548, 0448, 0431, 0432).

The United States, in contrast, had engaged in years of study about the use of defoliants for military applications and possessed a wealth of information pertaining to the potential hazards associated with the military use of such compounds. The United States never disclosed this information to petitioners. Instead, the United States developed and provided to Hercules and Thompson precise specifications for the production of Agent Orange.[4] The United States periodically inspected Hercules' and Thompson's plants to verify that the composition of the Agent Orange produced met these specifications. While the United States knew as early as 1959 that the manufacture of Agent Orange according to these specifications would produce a highly toxic by-product known as "dioxin," Hercules and Thompson were ignorant of this fact when they began manufacturing Agent Orange pursuant to the United States' specifications. (Jt. App. 0446-0447, 0450, 0459, 0465, 0467, 0489).

All of the Agent Orange produced by Thompson and Hercules was provided to the United States under "rated orders" pursuant to the Defense Production Act. *See In Re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 844 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

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[3] All citations to "Jt. App. ——" refer to the Joint Appendix filed in the proceedings before the United States Court of Appeals for the Federal Circuit.

[4] These specifications included the requirement that no warning labels or instructions of any kind be placed on the product.

Thompson and Hercules would have been subject to civil and criminal penalties, as well as mandatory injunctions, if they had not complied with the United States' demands. These demands eventually resulted in the virtual takeover of Hercules' and Thompson's production facilities, despite the protestations of both Thompson and Hercules. Indeed, in March of 1967 the United States Department of Defense directed Hercules to divert its *entire* herbicide production capacity to the manufacture of Agent Orange. The United States rejected Hercules' request for some relief from the government's rated orders so that it could satisfy its pre-existing commercial commitments.

Thompson went to great lengths to attempt to avoid the compelled production of Agent Orange altogether. Among other things, the President of Thompson personally flew to Washington, D.C. and petitioned the Department of Defense to release Thompson from the rated orders so that it would not have to manufacture Agent Orange at all. These efforts, however, proved unavailing and Thompson was ordered under the Defense Production Act to produce Agent Orange. (App. 4a).

B. The Agent Orange Litigation

In the late 1970s, Hercules and Thompson, along with other Agent Orange manufacturers, were sued in a class action by thousands of veterans and others seeking damages for health problems resulting from exposure to Agent Orange ("Agent Orange Litigation"). The United States was brought into the case by the defendant manufacturers as a third-party defendant. The Agent Orange plaintiffs alleged that Agent Orange produced in accordance with government specifications contained dioxin as a by-product, which was alleged to be one of the most potentially toxic substances known to man. The plaintiffs sought up to $40 billion in damages. (Jt. App. 0510).

Hercules and Thompson, among others, moved for summary judgment against the plaintiff class on the

grounds that they were not subject to suit because, in manufacturing Agent Orange, they complied in full with government specifications. This defense, now known as the "government contractor defense," would subsequently be recognized by a sharply divided Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), *cert. denied*, 488 U.S. 994 (1988) ("*Boyle*"). Although Judge Pratt, the first district judge assigned to the case, wrote a decision that granted petitioners' motion, *In Re Agent Orange Product Liability Litigation*, 565 F. Supp. 1263 (E.D.N.Y. 1983), Judge Weinstein took over the Agent Orange litigation and withdrew Judge Pratt's opinion before it was entered as a formal judgment.[5] Thereafter, Judge Weinstein ruled that Hercules and Thompson would remain as defendants in the litigation and that the viability of the government contractor defense could not be determined on summary judgment, but would have to be determined by the jury during the trial on liability. *In Re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Rather than risk a catastrophic judgment and incur enormous attorneys' fees and litigation costs in the process, even if successful, Hercules and Thompson joined the rest of the defendant companies in their decision to settle the matter. The United States was invited to participate in the settlement negotiations, but refused to do so. *In Re Agent Orange Product Liability Litigation*, 597 F. Supp. at 879. On May 7, 1984, on the eve of trial, Hercules, Thompson, and all of the other defendant companies settled the Agent Orange class action for a total of $180 million to be divided among the defendants on a market share basis. Hercules' share of the settlement was $18,772,568. Thompson's share of the settlement was $3,096,597. There is no issue at this point about the reasonableness of the amount of the settlement or

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[5] In the absence of the entry of a formal judgment, Judge Pratt's decision was, of course, a legal nullity. Fed. R. Civ. P. 58.

petitioners' contribution thereto. Also, during the litigaton, Hercules incurred defense costs in excess of $6 million. Thompson incurred defense fees in excess of $3 million.

The district court affirmed the Agent Orange settlement as reasonable and fair to the plaintiff class four months later. At that time, the district court held that, if Hercules and Thompson had not settled, "there was a possibility of an ultimate liability with claims totalling *billions of dollars.*" *In Re Agent Orange Product Liability Litigation*, 597 F. Supp. at 749 (emphasis added).

Some of the Agent Orange plaintiffs opted out of the class action settlement and continued to press their individual claims. The petitioners later moved for summary judgment against these individuals on various grounds, including the government contractor defense. However, the United States, which was still a third-party defendant in the case, vehemently opposed the assertion of this defense, arguing in its brief in opposition to the motion for summary judgment that "there exists substantial and convincing evidence that establishes not only that there are indeed genuine issues of material fact directly bearing on the validity of each and every contention relating to the government contract defense, *but also that the defense does not further the policies it purports to serve.*" (Jt. App. 0664) (emphasis added). Despite the government's opposition, the court awarded summary judgment against the plaintiffs who had opted out from the class. *In Re Agent Orange Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

Even though Hercules and Thompson resolved the Agent Orange litigation on comparatively favorable terms, the cost of the settlements and the legal fees seriously affected the financial status of both Hercules and Thompson. In fact, Thompson ultimately was forced to cease operations due to the threat of future liabilities stemming

from its manufacture of Agent Orange. Both companies continue to defend Agent Orange tort claims at considerable expense.[6]

C. The Government's Escape From Accountability

On June 8, 1990 and May 7, 1990 respectively, Hercules and Thompson independently commenced actions in the United States Claims Court seeking reimbursement from the United States for the settlement and defense costs they had incurred in connection with the Agent Orange litigation. Their complaints set forth several different claims for relief based on a contractual breach by the government, plus a claim under the Defense Production Act based on indemnification.

Petitioners' principal contract claim was based on *United States v. Spearin*, 248 U.S. 132 (1918) ("Spearin"). Hercules and Thompson each alleged that the government

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[6] Indeed, despite the supposed invincibility of the government contractor defense, Hercules and other Agent Orange manufacturers continue to face a wide range of claims stemming from their manufacture of Agent Orange for the government. Those claims include efforts to have the entire Agent Orange settlement agreement thrown out and the original class action reinstated, *Ivy v. Diamond Shamrock Chemicals Co.*, 114 S. Ct. 1125 (1994) (denying certiorari in case urging reopening of the Agent Orange litigation); independent actions by other Vietnam veterans who assert that their claims did not arise until after the settlement in the Agent Orange litigation, *e.g.*, *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992); and claims by civilians allegedly exposed to Agent Orange in Vietnam who were outside the scope of the Agent Orange class as certified by Judge Weinstein, *e.g.*, *Ryan v. Dow Chemical Co., supra*. On May 17, 1994, a group of Korean Army veterans who served in Viet Nam moved to intervene in the original Agent Orange litigation for the purposes of participating in the settlement fund. Subsequently, on August 2, 1994, twenty-four Korean veterans, out of some 320,000 Koreans who served in Vietnam, filed suit in federal district court against the same Agent Orange defendants seeking damages for personal injuries allegedly suffered from exposure to Agent Orange. *Jae Sup Chung v. Dow Chemical Co.*, No. C-94-2513 (N.D. Cal. filed August 2, 1994).

breached a contractual warranty of specifications by requiring them to manufacture a product, pursuant to government design specifications, that the United States (but not petitioners) knew would contain a dangerous by-product (dioxin). Those specifications ultimately proved to be the basis for veteran plaintiffs' claims that Agent Orange was defective and thereby subjected Hercules and Thompson to potential third-party liability of an enormous magnitude.[7]

The claim for indemnification under the Defense Production Act was predicated on the plain language of 50 U.S.C. § 2157, which specifically provides that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act." Because Thompson and Hercules had produced Agent Orange under an "order issued pursuant to this Act," this provision evidenced a clear Congressional intent to indemnify petitioners against any losses they incurred as a result of the Agent Orange litigation.

Prior to any discovery taking place and solely on the basis of the pleadings, the Claims Court dismissed the complaints of Hercules and Thompson on summary judgment. The trial court held that all of the claims asserted were barred as a matter of law. (App. 47a-115a).

A divided panel of the Federal Circuit affirmed the dismissal on the grounds that the government contractor defense would have provided Hercules and Thompson with an absolute defense to the claims of the plaintiff class in the Agent Orange litigation had that matter been

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[7] **Other claims for relief arose from the Government's breach of its additional obligations to disclose superior knowledge concerning the potential hazards of Agent Orange and dioxin; the Government's breach of its duty to exercise due care in using Agent Orange; and the Government's breach of the duty of good faith and obligation not to increase contract costs.**

litigated to a conclusion. In particular, the Federal Circuit held:

> There can be no serious doubt that had the class action Agent Orange Litigation proceeded to termination, no liability would have been imposed against Hercules or Thompson.

(App. 23a). The court of appeals thus held that the cost of settlement incurred by Hercules and Thompson was purely voluntary and had nothing to do with any breach by the United States of a warranty of specifications.[8]

As to the claim for indemnity under the Defense Production Act, the court of appeals concluded that, while the plain language of the act grants indemnity as a *quid pro quo* for the action the contractor is compelled to take, the ordinary practice of indemnifying against the costs of delay arising from requiring priority of performance for the government over private customers is the limit of the indemnity. Accordingly, costs that arise from compulsion to accept performance in and of itself are not included within the scope of the indemnification. (App. 28a-33a).

Judge Plager dissented from the panel's disposition of each of the claims asserted by petitioners, concluding that "the law affords substantially more justice than the majority concedes." (App. 34a). After tracing the convoluted and complicated history of "the so-called 'government contractor defense,' " Judge Plager observed that the majority's suggestion "that the evolving government

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[8] As to petitioners' claim that the government breached its obligation to disclose superior knowledge, the court of appeals created a new rule that the doctrine of superior knowledge only extends to undisclosed information which increases costs during performance of a contract. Because the costs petitioners incurred in defending and settling the Agent Orange litigation occurred after the actual performance of their contracts to manufacture Agent Orange, the court of appeals held that, as a matter of law, such costs could not be recovered. (App. 15a-16a.)

contractor defense would clearly dictate the outcome in the original *Agent Orange* litigation seems to me to be unwarranted historical revisionism, out of place in the decision before us in this case." (App. 40a).[9] Similarly, Judge Plager viewed the majority's conclusion on the claim for indemnification under the Defense Production Act as "a *non sequitur*," and one which "ignores the language of the statute." (App. 44a).

REASONS FOR GRANTING THE PETITION[10]

Judge Plager's dissent plainly and eloquently states the equities involved in petitioners' effort to recover for the losses they suffered as a result of the government's decision to "seize" their companies, and compel them "to engage in a dangerous enterprise." (App. 44a, 46a). It cannot seriously be disputed that petitioners were harmed by the government's actions in mandating the manu-

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[9] As to the majority's basis for dismissing the superior knowledge claim asserted by petitioners, Judge Plager commented that "[t]here is neither prior authority nor present reason to limit the doctrine of superior knowledge to require compensation only for the difficulties incurred during performance. . . . if the Government's incomplete or misleading information, or its particular specification of its requirements, imposes losses, now or later, on the contractor, then the Government, like any other contractor, should not escape responsibility." (App. 41a, 43a).

[10] The Federal Circuit has exclusive jurisdiction over final decisions of the United States Court of Federal Claims. *See* 28 U.S.C. § 1295(a)(3). Accordingly, there will rarely, if ever, be a conflict among the Circuits regarding issues raised in cases filed in the United States Court of Federal Claims. However, because the Federal Circuit has exclusive jurisdiction over the United States Court of Federal Claims and certain other federal courts, the rules that the Federal Circuit applies are "a matter of special importance to the entire Nation." *Cardinal Chemical Co. v. Morton International, Inc.*, —— U.S. ——, 113 S. Ct. 1967, 1971 (1993). This Court has not hesitated to grant review in cases involving issues of recurring importance to the relationship between the federal government and private litigants. *See e.g., Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *cert. granted*, 114 S. Ct. 1396 (1994).

facture of a product pursuant to specifications which the government supplied and which it knew would result in the generation of a dangerous by-product (dioxin). The government's actions led inexorably to the Agent Orange litigation, and just as inexorably to the settlement of that matter on the eve of trial. The only dispute is whether the law provides a means by which this wrong can be redressed.

According to the court of appeals, the law does not provide a remedy for Thompson and Hercules because petitioners "volunteered" to suffer the damages which inevitably flowed from the government's conscription of their manufacturing facilities. The majority engages in this "historical revisionism" (App. 40a), to achieve what it sees as a necessary symmetry between tort and contract principals: where sovereign immunity would preclude any private *tort* claims against the United States as a result of the government's discretionary activities, then innocent manufacturers compelled to assist in those activities must also be precluded from redress in *contract* against the United States for the damages the manufacturers suffer when those same tort claims are asserted against the manufacturers.

In the name of protecting the government fisc, the court of appeals denies petitioners the justice they deserve. The court forces this result by looking past the reasonableness of the settlement and conducting an inquiry into the underlying tort. This adventure undermines the established policy of encouraging reasonable settlement of litigation. This decision thus threatens, in the long run, to increase the costs of government contracting, costs which will ultimately be borne by the United States. This decision also threatens to involve the courts in convoluted efforts by the government to bar contract claims with tort defenses, creating inappropriate arguments about settlements entered with good cause and in good faith. The court concludes that Hercules and Thompson must bear the crippling costs of redressing the veterans for the

government's acts because it misapprehends *Boyle* to require a result which insulates the government.

Not only do established contract law principles and policies require that petitioners be able to recover against the United States the damages they suffered as a result of the United States' breach of its contractual obligations, but the explicit language of the Defense Production Act establishes that Congress likewise believed the government should be held responsible for these same damages.

I. THE COURT OF APPEALS' DETERMINATION CONFLICTS WITH ESTABLISHED CONTRACT PRINCIPLES AND IMPORTANT POLICY CONSIDERATIONS.

The court of appeals incorrectly held that Hercules and Thompson were barred from suing the government for breach of an implied warranty of specifications because they settled the Agent Orange litigation. This decision is in direct conflict with the contractual right of action against the government that this Court established for government contractors decades ago in *Spearin*, 248 U.S. 132.

The elements necessary for a contractor to bring a claim against the government under *Spearin* are as follows:

(1) The specifications under the contract are design specifications, i.e., they set forth in precise details the materials to be employed and the manner in which the work is to be performed;

(2) The design specifications were devised and drafted by the government; and

(3) The government had superior knowledge concerning that part of the design specification causing the defect in the product contracted for.

Johns-Manville Corp. v. United States, 13 Cl. Ct. 72, 118-120 (1987), *vacated on jurisdictional grounds*, 855

F.2d 1571 (Fed. Cir. 1988). Where this showing is made, *Spearin* stands for the proposition that the contractor can recover damages from the United States for harm caused to the contractor by the defective specifications.

Hercules and Thompson both established all of the necessary elements for a *Spearin* claim against the government. It has been judicially determined in the Agent Orange litigation that the government had mandated design specifications for Agent Orange; that Hercules and Thompson had followed these specifications exactly; that the alleged defect in Agent Orange that gave rise to the Agent Orange litigation arose directly from the specifications; and that this defect was known to the government at the time it compelled Hercules and Thompson to produce Agent Orange. As damages, Hercules and Thompson asserted the costs of the Agent Orange litigation settlements and their legal fees.

The court of appeals held that a *Spearin* claim was barred because Hercules and Thompson could not prove causation between their damages and the breach of warranty. Specifically, the court held that, had Hercules and Thompson pursued the Agent Orange litigation to completion, eventually a court *would have* determined that the government contractor defense as later articulated in *Boyle* barred the imposition of tort liability against them. Thus, by settling with the class—instead of waiting for the jury or the court to absolve them of any liability—Hercules and Thompson voluntarily assumed liability for which the government was not responsible.[11]

Significantly, the court of appeals did not and could not cite any legal authority in support of this unprecedented decision. Indeed, the court's holding directly conflicts

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[11] Notably, had Hercules and Thompson submitted to trial and lost, their combined claim against the Government now could total billions of dollars, rather than $24 million. *See In Re Agent Orange Product Liability Litigation*, 597 F. Supp. at 749.

with established principles of contract law. In particular, where a breach by one party to a contract results in claims by third persons against the other party to the contract, the party sued is *not* required to litigate the third-party claims to conclusion and lose in order to recover damages associated with the third-party claims. Rather, "in furtherance of the policy favoring private settlement of disputes, the injured party is also allowed to recover the reasonable amount of any settlement to avoid litigation, together with the costs of settlement." *Restatement (Second) of Contracts* § 351, cmt. c (1981).

This rule allows parties like petitioners, "caught in the middle" between personal injury plaintiffs and other parties responsible for the injuries, to settle the third-party claims and then recover in contract the costs of that settlement against the other party where they can demonstrate 1) they were *potentially* liable to the third parties as a result of the conduct of the other party to the contract and 2) the settlement was reasonable based on the size of the possible recovery and the probability of the claimant's success. Contrary to the holdings below, this is a factual inquiry unsuitable for disposition on summary judgment.

For example, in *Parfait v. Jahncke Service, Inc.*, 484 F.2d 296, 304 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974), one company obtained reimbursement from another company for the cost of settling a lawsuit brought against it by an employee of the second company. Reimbursement was granted on grounds that a showing of the first company's potential liability to the employee was enough to justify the settlement. The application of this policy is so clear that in *Damanti v. A/S Inger*, 314 F.2d 395, 397 (2d Cir.), *cert. denied*, 375 U.S. 834 (1963), a shipowner recovered the cost of a settlement despite a jury finding that there was no underlying third-party liability, on grounds that the shipowner faced *potential* liability at the time that it settled. The decision below

manifestly conflicts with these decisions concerning the proper contract principles that should apply here.

Moreover, the court of appeals' decision in this case reflects a profound lack of appreciation for the realities of litigation which will undermine the strong judicial policy favoring settlements. *See Janneh v. GAF Corp.*, 887 F.2d 432, 435 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990) ("Litigants, courts, and Congress view settlement as a positive force, indispensable to judicial administration."); *Ahern v. Central Pacific Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988) (quoting from *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977)) ("there is an overriding public interest in settling and quieting litigation"). It is impossible to know whether the government contractor defense would have prevailed against the class in the Agent Orange litigation had it been submitted to the jury after trial. As stated succinctly by the dissenting judge below: "I do not know what the ultimate decision in the Agent Orange litigation would have been on this issue, nor does anyone." (App. 40a). Obviously, it was the existence of that uncertainty at the time that legitimately motivated the parties to settle.[12] To

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[12] Contrary to the court of appeals' holding, there are many reasons why, rightly or wrongly, the government contractor defense might have failed. First, the government contractor defense is a fact-specific, affirmative defense to liability. *Boyle*, 487 U.S. at 514 ("whether the facts establish the conditions for the [government contractor] defense is a question for the jury.") It does *not* immunize government contractors from being sued in tort actions, in the way that sovereign immunity precludes the assertion of such actions against the Government. *See Osborn v. Bank of United States*, 22 U.S. 738 (1824). There is no guarantee that a jury or court would have concluded that the defense applied to Hercules and Thompson.

Second, the test articulated by this Court in *Boyle* would certainly *not* have protected petitioners. *Boyle* holds that where a contractor furthers federal interests by complying with government specifications, that contractor should not have to answer in *state* court under state law principles given that "substantial fed-

penalize petitioners for their reasonable decision is unfair and distorts the litigation process in ways that can only cause a greater drain on scarce judicial resources.

However, if the court of appeals' decision is permitted to stand, every time a government contractor with a potential *Spearin* claim against the government is sued by a third-party plaintiff, the contractor will face a Hobson's choice. If the government contractor settles the third-party action, it will face the possibility that a federal court will decide in hindsight that it could have avoided any liability in the third-party action by litigating to conclusion the government contractor defense. If the government contractor does not settle, it will risk greater exposure and expense by proceeding to trial on the third-party claim. If the contractor prevails in the third-party action, no matter what the basis, the government will argue that the contractor has suffered no damages from any breach of warranty by the government. If the contractor loses, the government will argue that the contractor's failure to establish the government contractor defense in the underlying tort action precludes it from establishing the elements of a *Spearin* claim against the United States. In sum, the decision below severely undermines the *Spearin* claim without any discussion or even

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eral interests" are involved. 487 U.S. at 505-07, 511-12. The Federal Circuit in fact bases its reasoning upon the perils of government liability under state law. Yet the liability petitioners faced in federal district court was expressly not based upon state law, but a "national consensus law." *See In Re Agent Orange Product Liability Litigation*, 580 F. Supp. 690 (E.D.N.Y. 1984). Federal interests were tested by federal law in this matter, and no preemption issue existed in this litigation. *Boyle* would thus not have insulated petitioners. (App. 37a-40a).

Third, this defense failed Hercules and Thompson when they filed their motions for summary judgment against the class and the Government itself vehemently opposed the defense on factual and policy grounds when Hercules and Thompson later raised it against the opt-out plaintiffs in the Agent Orange litigation.

apparent recognition of that fact. For that reason alone, review by this Court is warranted.

In response to the holding of the court of appeals, government contractors will be required either to raise their prices to cover costs which will no longer be recoverable in contract from the United States, or refuse contracts altogether, thereby restricting potential competition which will likewise increase costs. This is precisely the result which *Boyle* sought to avoid. *Boyle*, 487 U.S. at 507. Given the importance of this issue to the relationship between the United States and its contractors, the Court should grant the petition.

II. THE COURT OF APPEALS' EFFORTS TO APPLY CONCEPTS AND POLICIES DEVELOPED IN TORT LAW TO THE ARENA OF GOVERNMENT CONTRACT LAW WILL CREATE UNNECESSARY CONFUSION AND UNCERTAINTY.

Established boundaries exist between claims against the United States sounding in contract versus those sounding in tort. In the area of tort claims as governed by the Federal Tort Claims Act, a complex jurisprudence has developed around the government's waiver of sovereign immunity and the numerous exceptions and procedural and substantive limitations to that waiver. The court of appeals' efforts to import that jurisprudence into the law of government contracts under the Tucker Act is fundamentally flawed, constitutes judicial legislation, and threatens to create untoward confusion and complexity in government contracting relations as the courts struggle to accommodate a linkage between tort and contract principles which should not exist.

Unlike tort claims against the government where no privity exists and an affirmative waiver of sovereign immunity is required, Tucker Act cases arise between parties in privity; the United States waives its protections against parties with whom it enters into contractual relations. Where the breach and the damage are within the foreseeable contemplation of the contracting parties, no

further analysis of sovereign immunity need be made. The court in a contract matter simply enforces the agreement between the parties in the light of established principles of contract law.

A suit which arises primarily from a contractual undertaking is not barred merely because the negligence of the United States ultimately results in the case developing a "tort aspect." *American Ship Building Co. v. United States*, 207 Ct. Cl. 1002 (1975), *rev'd other grounds*, 654 F.2d 75 (Ct. Cl. 1981); *Bird & Sons, Inc. v. United States*, 190 Ct. Cl. 426 (1970). This Court in *Boyle* noted the contract basis of such actions, stating that the "liability may be styled one in tort, but it arises out of performance of the contract." 487 U.S. at 505. The United States is without question answerable for its *contract* breaches, even when the contract involves purchases and designs which are protected from *tort* claims by third parties under the same discretionary function exception in which *Boyle* grounded the government contractor defense. As recognized by the court in *Peter v. United States*, 6 Cl. Ct. 768, 778 (1984):

> The policy considerations that motivate the sovereign . . . do not create an umbrella that shields the Government from liability for breach of valid contracts customarily entered. A multitude of defense contractors would be surprised to be told that contracts for ship construction, aircraft production and munitions testing were unenforceable because they were related to defense and foreign policy goals.

Where the contractor's suit against the government is for breach of contract, the parties, the injury, and the cause of action are different than in third-party tort practice. If the contractor makes the necessary showing to recover damages under established contract principles, including a showing that the government has breached its obligations under the contract and that the contractor has incurred damages stemming from a third-party lawsuit caused by the government's breach, it is simply immaterial that the existence of a tort defense (the government con-

tractor defense) might have prevented the contractor from being further damaged.[13]

III. THE COURT OF APPEALS IGNORED THE PLAIN LANGUAGE OF THE DEFENSE PRODUCTION ACT REQUIRING THE GOVERNMENT TO REIMBURSE PETITIONERS FOR THE DAMAGES THEY SUFFERED AS A CONSEQUENCE OF MANUFACTURING AGENT ORANGE.

Consistent with the principles discussed above, Congress itself clearly addressed the issue of how liabilities should be allocated when the government and its contractors face damage claims together as a result of the government-compelled actions of the contractor. Congress not only left the Tucker Act free of exceptions to contractual liability based on the government's discretionary activities, but Congress also stated unequivocally that a contractor compelled to perform a contract by the government is held harmless for any third-party liabilities arising as a result.

Specifically, the Defense Production Act, under whose authority the government compelled petitioners to accept and perform the Agent Orange production contracts, authorizes the President to:

> require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance of any other contract or order and, for the purpose of assuring such priority, to *require acceptance* and performance of such contracts or orders in preference to other contracts or orders . . .

50 U.S.C. § 2071(a) (emphasis supplied).

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[13] Indeed, the Federal Acquisition Regulations (FAR) applicable to cost reimbursement contracts make no distinction between the recoverability of a tort-related cost and any other cost incurred in the course of performing the contract. *See* FAR §§ 28.311-2 and 52.228-7(c). The court of appeals' ruling below, therefore, threatens to undermine rules established in the FAR.

The indemnity provision of the Defense Production Act broadly and plainly provides, *inter alia*:

> *No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act. . . .* No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under Title I of this Act . .

50 U.S.C. § 2157 (emphasis supplied).[14]

Petitioners contend that the government's compulsion of Hercules and Thompson to manufacture Agent Orange and its control over specifications and production, in conjunction with the "hold harmless" provision of the Defense Production Act, create an implied-in-fact agreement to indemnify petitioners for the damages they suffered in the Agent Orange litigation.[15] The syllogism by which

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[14] The court of appeals read the second sentence as narrowly limiting the scope of the protections created in the first sentence. (App. 31a-32a). No rule of statutory construction allows the extremely broad language of the first sentence to be constrained to only the particulars that follow. The second sentence in fact addresses a different protection. As Judge Plager noted in his dissent (App. 44a-45a), the language of the hold harmless provision bars liability for damages without qualification as to type, and contains sweeping language barring liability for any damages directly or indirectly resulting from compliance with any order issued under the Act. No language limits this provision to only those orders which happen to involve priority status.

[15] The context in which the government compelled petitioners to manufacture Agent Orange constitutes an implied-in-fact agreement by the government to indemnify petitioners for losses to third parties. This indemnity goes to the very heart of the relationship the government took on in its treatment of petitioners. In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 133 (1956), this Court required an indemnitor to perform. In discussing the stevedore's obligation to handle operations safely, the Court concluded that "This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract."

the Defense Production Act applies here is straightforward: the indemnity created in the Act is co-extensive with the requirements imposed by the Act (a *quid pro quo*); Thompson and Hercules were required to *accept* and *perform* a contract; therefore, the indemnity covers the risks Thompson and Hercules incurred by virtue of their performance of the contract.

The court of appeals accepted each premise, agreeing that "[l]ogically, then, the protection afforded by section [2157] should correspond to the risk imposed" and recognized that Thompson and Hercules were compelled under the authority of the Defense Production Act to accept contracts they did not want to perform. (App. 28a). Instead of ending the syllogism by holding the United States liable, the court of appeals gymnastically leapt over the logical conclusion and instead held no indemnity as a matter of law. In an act of judicial legislation, the majority accomplished this by limiting the hold harmless provision only to those damages that arise from the use of Defense Production Act authority to require priority in the performance of contracts, and excluding from indemnity harms which arise from forcing acceptance of a contract in the first instance. Thompson and Hercules were required to *accept* and *perform* contracts they otherwise would have rejected. Even though "assuring such priority" is one of the powers conferred by the Act, there is nothing in the language of the hold harmless provision that arbitrarily limits the *quid pro quo* in a way that exposes a defense contractor to enormous potential liability with no means of avoiding the liability either before or after it is incurred. This is outrageous and should not be countenanced by the Court.

Given the confusion which surrounds the efforts to apply this Court's reasoning in *Boyle* to the forced production of Agent Orange, the Defense Production Act offers a straightforward legal basis by which the wrong done petitioners can be remedied. Compelled under the authority of this Act to manufacture a defoliant petition-

ers later discovered was highly toxic, and which resulted in one of the largest potential damage exposures ever faced, petitioners followed the least damaging course to all parties concerned. For these efforts, one has been put out of business and the other has suffered severe losses. The Defense Production Act states clearly and unequivocally that "No person shall be held liable for damages to act resulting directly or indirectly from compliance with a[n] . . . order issued pursuant to this Act." This Court has the opportunity to end a manifest injustice to petitioners, and in so doing set the law on its proper course so that further exercises of authority under the Defense Production Act will not impose crippling burdens on defense contractors forced to protect national security interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5124

HERCULES INCORPORATED,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

92-5138

WM. T. THOMPSON COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: May 4, 1994

Before PLAGER, CLEVENGER, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

In these consolidated appeals, Hercules Incorporated (Hercules) and Wm. T. Thompson Company (Thomp-

son), respectively, appeal the April 2 and April 22, 1992 judgments of the United States Claims Court.[1] In those judgments, the court dismissed Hercules' and Thompson's complaints after granting the motions of the United States for summary judgment.[2] Hercules and Thompson, who are chemical manufacturers, had sought to recover the sums they contributed to a fund established in connection with the settlement of a district court class action tort suit brought against them and other companies by and on behalf of individuals who were exposed to a defoliant known as "Agent Orange" during the Vietnam War. Hercules and Thompson also had sought to recover the attorney fees and expenses incurred in that litigation.[3]

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[1] The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516, changed the name of the United States Claims Court to the "United States Court of Federal Claims." Unless the context requires otherwise, we refer to the trial court by the name which it had while this matter was pending before it.

[2] *Hercules, Inc. v. United States*, 25 Cl. Ct. 616 (1992); *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17 (1992).

[3] Throughout this opinion, we will cite to the following four district court decisions in what we refer to as the "Agent Orange litigation":

i. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (decision certifying Fed. R. Civ. P. 23(b)(3) class of plaintiffs);

ii. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263 (E.D.N.Y. 1983) (decision granting summary judgment in favor of defendant chemical manufacturers—subsequently reconsidered after the case was transferred to another district judge);

iii. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (decision approving settlement agreement between class action plaintiffs and defendant chemical manufacturers); and

iv. *In re "Agent Oragnge" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985) (decision granting summary judgment in favor of defendant chemical manufacturers against plaintiffs who had opted-out of the class action).

Finding no error in the Claims Court's decisions, we affirm the judgments.

BACKGROUND

The following facts are not in dispute:

A. Historical

In the mid to late 1960s, Hercules and Thompson were members of a group of chemical companies that manufactured Agent Orange for the United States military. Agent Orange is a blend of equal parts of 2,4-Dichlorophenoxyacetic Acid (2,4-D) and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T), both of which are phenoxy herbicides. *Hercules, Inc. v. United States*, 25 Cl. Ct. 616, 618 (1992). Depending on its method of production, Agent Orange may contain varying amounts of 2,3,7,8 Tetrachlorodibenzo-p-dioxin (dioxin), an extremely toxic substance. *Id.* The military used Agent Orange during the Vietnam War to defoliate large areas of forest so that Viet Cong and North Vietnamese troops could not hide beneath the foliage from view of aircraft. The military mixed the Agent Orange produced by the various chemical companies and stored the mixture in large drums. *Id.* at 619. During the relevant period, the government and the military had considerable knowledge of hazards associated with 2,4,5-T and dioxin. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263, 1266 (E.D.N.Y. 1983).

Hercules began producing phenoxy herbicides containing 2,4,5-T in 1961. *Hercules*, 25 Cl. Ct. at 619. It produced Agent Orange for the government between May 8, 1964, and May 20, 1968, pursuant to fifteen separate contracts. *Id.* The military supplied the formula and specifications for manufacturing Agent Orange, with which Hercules complied. *Id.* In its complaint in the Claims Court, Hercules alleged that it manufactured and supplied Agent Orange pursuant to the Defense Produc-

tion Act of 1950, 50 U.S.C. app. § 2061-2170 (1964) (hereinafter, DPA).[4] In 1965, Hercules learned of the health risks associated with 2,4,5-T and changed its method of production to eliminate dioxin from its product. *Id.; In re "Agent Orange"*, 565 F. Supp. at 1274. From 1966 to 1970, Hercules' product was not measurably contaminated with dioxin. *Id.*

Thompson produced phenoxy herbicides containing 2,4,5-T and 2,4-D in the 1950s and 1960s. Thompson, however, originally declined to bid on the government's solicitation to chemical manufacturers for the production of Agent Orange. *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 20 (1992). In due course, however, the government invoked the DPA and required Thompson to supply Agent Orange pursuant to two contracts dated April 19, 1967, and May 24, 1968. *In re "Agent Orange"*, 565 F. Supp. at 1272. Between September 1967 and January 1969, Thompson supplied Agent Orange to the military. *Id.* There is no evidence that Thompson was aware of the health risks associated with Agent Orange. *Id.* at 1273. As in the case of Hercules, the government provided the formula and specifications for Agent Orange without any input from Thompson.

B. The Agent Orange Litigation

Starting in 1979, numerous tort actions were filed by Vietnam veterans and their families against the various chemical manufacturers who produced Agent Orange for the government, including Hercules and Thompson. The tort actions alleged that the veterans' exposure to dioxin contained in Agent Orange produced by the chemical

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[4] The DPA authorizes the President, *inter alia*, to require acceptance and performance of contracts which he deems necessary or appropriate to promote the national defense in preference to other contracts. 50 U.S.C. app. § 2071. The pertinent parts of the statute are discussed below.

companies had caused various health problems for the plaintiffs, such as cancer, miscarriages, and birth defects. The Judicial Panel on Multi-District Litigation consolidated these tort actions in the United States District Court for the Eastern District of New York, under the heading MDL No. 381. The court certified a class comprising all veterans claiming injuries who had served in or near Vietnam between 1961 and 1972, pursuant to Fed. R. Civ. P. 23(b)(3). The certified class also included the veterans' spouses, parents, and children (born before January 1, 1984) directly or derivatively injured as a result of the veterans' exposure. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 787-92 (E.D.N.Y. 1980). Plaintiffs were allowed to "opt out" of the Rule 23(b)(3) class by May 1, 1984. *Id.* As discussed below, nearly 300 of the plaintiffs opted out.

Hercules and Thompson, along with several other defendant manufacturers, moved for summary judgment in the district court on the ground that, because of their status as government contractors, the government contractor defense shielded them from liability for any injuries to the veterans or their families allegedly caused by exposure to Agent Orange. *In re "Agent Orange"*, 565 F. Supp. at 1265.[5] In a previous pretrial order, the district court had defined the contours of the government contractor defense as follows:

> [A] defendant in this case will be entitled to judgment dismissing all claims against it based on that defendant's having supplied "Agent Orange" to the government pursuant to a contract, if the defendant proves:
>
> 1. That the government established the specifications for "Agent Orange";

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[5] The district court used the term "government contract defense." *Id.*

> 2. That the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and
>
> 3. That the government knew as much or more than the defendant about the hazards to people that accompanied use of "Agent Orange."

Id. (quoting *In re "Agent Orange" Prod. Liab.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982)).

On May 20, 1983, the district court granted summary judgment for Hercules and Thompson, along with two other manufacturers of Agent Orange, finding that they met the requirements of the "government contract defense." *Id.* at 1273, 1274. In so ruling, the district court framed the "central issue" as whether the third element of the government contractor defense had been established, i.e., "whether the government knew as much as or more than the contracting defendant about the hazards to people that accompanied the use of 'Agent Orange.'" *Id.* at 1265.

With respect to Hercules, the district court concluded that because its "product was dioxin-free, Hercules had no knowledge of harm from dioxin contamination caused by its product and thus did not know more than the government about hazards associated with the use of its product." *Id.* at 1274.

In Thompson's case, the district court concluded that although the evidence established that Thompson may have had "knowledge of possible health hazards related to the *manufacture* of Agent Orange[, the evidence did not establish] knowledge in Thompson of hazards to *users*." *Id.* at 1273 (emphasis supplied). In contrast, the district court believed that "it [was] clear by 1967, when Thompson first contracted to manufacture Agent Orange, the government had a significant amount of knowledge about dioxin . . . and its association with . . . health problems." *Id.*

Hercules' and Thompson's victory in the district court proved to be short-lived, however. After summary judgment was entered in their favor and in favor of the other two Agent Orange manufacturers—but before a judgment of dismissal was entered—the case was transferred to another judge in the Eastern District of New York. In November of 1983, the transferee judge reconsidered the issue and denied the summary judgment motions of Hercules and Thompson. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 753 (E.D.N.Y. 1984).

On May 7, 1984, the date that trial would have begun in the class action suit, the parties reached a settlement. The settlement called for the creation of a $180 million settlement fund, with each defendant contributing to the fund in proportion to its percentage of the total volume of Agent Orange produced, with a factor for the level of dioxin in the particular manufacturer's product. *In re "Agent Orange"*, 597 F. Supp. at 748. Hercules' share of the settlement was about ten percent, valued at $18,772,568. Thompson's share was around two percent, amounting to $3,096,597. In its opinion approving the settlement, the district court noted that the plaintiffs would have had extreme difficulty proving that their injuries resulted from exposure to dioxin present in the Agent Orange. *In re "Agent Orange"*, 597 F. Supp. at 782.

Upon settlement of the class action, the defendant manufacturers, including Hercules and Thompson, moved for summary judgment against the nearly 300 plaintiffs who had opted-out of the class action suit. These opt-out plaintiffs were those who had voluntarily chosen not to be part of the certified Rule 23(b)(3) class, and who consequently did not share in the $180 million settlement fund. In support of the summary judgment motion, the defendant manufacturers argued that they were entitled to judgment

> because of each plaintiff's conceded inability to identify the individual manufacturer of the Agent Orange

> to which a given veteran was exposed, inapplicability of any alternative theory of liability that would overcome that inability, the government contract defense, and inability of any plaintiff to prove that his or her injuries were caused by Agent Orange.

In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The district court granted summary judgment for the manufacturers primarily on the ground that the plaintiffs had failed to present credible evidence of a causal link between exposure to Agent Orange and the plaintiffs' alleged injuries. *Id.* at 1259-60. As a secondary basis, the district court held that the defendant companies were insulated from liability by the government contractor defense as it was "clear from the record . . . that the government knew as much as, or more than, the defendant chemical companies about the possible adverse health effects of Agent Orange as it was used in Vietnam." *Id.* at 1263. This secondary ground for summary judgment was identical, of course, to the ground upon which summary judgment had been granted in favor of Hercules and Thompson two years earlier, before the case was transferred.

The United States Court of Appeals for the Second Circuit affirmed both the settlement with the Rule 23(b)(3) class, *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145 (2d Cir. 1987), and the grant of summary judgment in favor of the defendant manufacturers against the opt-out plaintiffs. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The Court of Appeals affirmed the grant of summary judgment against the opt-out plaintiffs solely on the basis of the government contractor defense (referred to as the "military contractor defense" by the Second Circuit), and did not address the other grounds for summary judgment advanced by the district court. *Id.* at 189.

C. The Claims Court Proceedings

In 1990, Hercules and Thompson each brought an action in the Claims Court against the United States, seeking (i) indemnification for their respective contributions to the settlement fund in the 1984 class action settlement, and (ii) legal fees and expenses incurred in the Agent Orange litigation. *Hercules*, 25 Cl. Ct. at 620. The actions were grounded in Hercules' and Thompson's respective contracts with the government for the production of Agent Orange.

Hercules' complaint, filed June 8, 1990, asserted that it was entitled to recover from the government under any one of the following four theories:

1. *Superior Knowledge*—The government allegedly breached an implied-in-fact contractual obligation by withholding from Hercules the government's superior knowledge concerning the unprecedented military use of Agent Orange by the government and the possible health risks attendant with such use.

2. *Good Faith*—The government allegedly breached an implied-in-fact contractual obligation to exercise good faith and not increase Hercules[']' costs by using Agent Orange in Southeast Asia in an unprecedented military manner that failed to avoid potential health risks.

3. *"Reverse" Warranty*—The government allegedly breached an implied-in-fact contractual obligation to exercise due care in using Hercules' Agent Orange. Specifically, Hercules alleged that the government had a duty to use the Agent Orange it purchased from Hercules in a manner reasonably calculated to avoid potential health risks and to take adequate precautions and safeguards or provide identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

4. *Implied Warranty of Specifications*—The government allegedly breached an implied-in-fact contractual

obligation "to establish specifications and requirements for Agent Orange sufficient to make Agent Orange adequate and suitable for the unprecedented intended and actual military use to which it was put in Southeast Asia.

Under each of its different theories of liability, Hercules alleged that the government's breach of its contractual obligations caused Hercules to sustain increased expenses of performance and incur substantial money damages in connection with the Agent Orange cases and that Hercules was entitled to contractual indemnification therefor.

Thompson's complaint, filed May 7, 1990, and amended October 23, 1990, asserted that it was entitled to recover against the government under any one of three contractual theories, two of which were substantially identical to two of Hercules' theories of liability: superior knowledge by the government, and an implied warranty of specifications. As a third alternative theory of liability, Thompson contended that the goverment breached an implied-in-fact contractual obligation to indemnify Thompson for losses arising from its compelled production of Agent Orange under the DPA.

In each case the government moved to dismiss the complaint, or, in the alternative, for summary judgment as a matter of law. *Hercules*, 25 Cl. Ct. at 620; *Wm. T. Thompson*, 26 Cl. Ct. at 22. The Claims Court granted the government's motions for summary judgment and dismissed both cases. In so ruling, the court held that the superior knowledge doctrine only applied in situations where the government possessed vital knowledge that affected contract "performance costs or duration of performance." *Hercules*, 25 Cl. Ct. at 623; *Wm. T. Thompson*, 26 Cl. Ct. at 24. Because Hercules' and Thompson's increased costs were the result of post-performance litigation and were not connected to contract performance, the Claims Court concluded, the superior knowledge doctrine could not be expanded to encompass their claims. *Id.* Similarly, the Claims Court found that Hercules' good

faith theory could not withstand summary judgment because it was "another performance-related doctrine" that could not be extended to matters occurring "at some distant point in the future" after contract performance. *Hercules*, 25 Cl. Ct. at 623.

With regard to Hercules' reverse warranty argument, the Claims Court held that such an implied-in-fact reverse warranty never arose because the circumstances surrounding the sale of Agent Orange could not support a factual inference that Hercules and the government had "actually come to a meeting of the minds and taken upon themselves [the] corresponding obligations and liabilities" of the alleged reverse warranty. *Hercules*, 25 Cl. Ct. at 624.

Turning to the warranty of specifications theory, the Claims Court held that even assuming that such a warranty arose, the plaintiff-manufacturers had failed to prove "that this warranty was *breached* by the Government and that this breach caused [them] to suffer the type of damages recoverable in contract." *Hercules*, 25 Cl. Ct. at 625-26; *Wm. T. Thompson*, 26 Cl. Ct. at 25. Addressing first the portion of the damages claim which consisted of the payments into the settlement fund, the court set forth two separate reasons that it believed prevented Hercules and Thompson from proving that they were "actually subjected to tort liability by third parties because of [their] manufacture of Agent Orange for the Government's military use." *Hercules*, 25 Cl. Ct. at 626; *Wm. T. Thompson*, 26 Cl. Ct. at 26. "First," the Claims Court stated, "dioxin has never been scientifically proven to cause the injuries that veterans alleged, and second, the [plaintiff-manufacturers were] protected from liability to the veterans in any event under the Government contractor defense. . . ." *Id.*

Regarding the type of damages sought, the Claims Court, citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), and *Northern Helex Co. v. United States*, 524 F.2d 707, 721 (Ct. Cl. 1975), *cert. denied*,

429 U.S. 866 (1976), stated that "it is axiomatic that . . . damages [arising from contract breaches] are limited to those that were reasonably foreseeable at the time the parties formed the contract." *Hercules,* 25 Cl. Ct. at 627-28; *Wm. T. Thompson,* 26 Cl. Ct. at 27-28.

From this proposition, the court reasoned that

> [t]he facts may support an implied warranty of specification, but they cannot be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an indemnification agreement between them if the implied warranty of specification was alleged, but never proven, to be violated.

Hercules, 25 Cl. Ct. at 627; *Wm. T. Thompson,* 26 Cl. Ct. at 28.

The Claims Court also held that

> there was no breach of the warranty of specification based on the manufacturer's tort liability to third parties supposedly injured by the product because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense.

Hercules, 25 Cl. Ct. at 628; *Wm. T. Thompson,* 26 Cl. Ct. at 28. We read this latter statement as a holding by the Claims Court that, assuming the existence of an implied warranty of specifications, Hercules and Thompson could not establish that the damages which they incurred—their payments into the Agent Orange settlement fund—flowed from a breach of that warranty, because the government contractor defense protected them against those damages and they incurred those damages as a result of their decision to settle the litigation in the face of that protection.

As far as the claims for attorney's fees were concerned, the Claims Court held that Hercules and Thompson could not recover such fees because they represented the kind

of remote and consequential damages not normally awarded in contract cases. *Hercules,* 25 Cl. Ct. at 627-28; *Wm. T. Thompson,* 26 Cl. Ct. at 27-28, both citing *Kania v. United States,* 650 F.2d 264, 269 (Ct. Cl.), *cert. denied,* 454 U.S. 895 (1981).

In the case of Hercules' and Thompson's assertions that they were entitled to contract indemnification, the Claims Court noted that their respective contracts contained no provision expressly providing for indemnification. *Hercules,* 25 Cl. Ct. at 633; *Wm. T. Thompson,* 26 Cl. Ct. at 28. In Thompson's case, the court rejected the contention that an implied-in-fact contract indemnification term arose from section 707 of the DPA,[6] because that section merely "excuses a Government contractor's breach of its other, non-Government contracts which were adversely affected by the priority given to the Government's procurement demands under the DPA." *Wm. T. Thompson,* 26 Cl. Ct. at 29. In addition, in the case of both Hercules and Thompson, the court held that, even assuming that an implied-in-fact contractual obligation to indemnify existed, the provision would be unenforceable as violative of the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988).[7] *Hercules,* 25 Cl. Ct. at 634; *Wm. T. Thompson,* 26 Cl. Ct. at 29.

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[6] In pertinent part, section 707 of the DPA states:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act. . . .

50 U.S.C. app. § 2157 (1964).

[7] In pertinent part, the Anti-Deficiency Act states that officers or employees of the United States may not:

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341 (1988).

Finally, the Claims Court held that the policies underlying the government contractor defense provided a "separate and independent" basis for denial of all claims against the government by Hercules and Thompson. *Hercules,* 25 Cl. Ct. at 631; *Wm. T. Thompson,* 26 Cl. Ct. at 33.

DISCUSSION

A. Standard of Review

A trial court may award summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); RUSCC 56(c); *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). In reviewing a grant of summary judgment by the trial court, we determine for ourselves whether the standards for summary judgment have been met and we are not bound by the trial court's ruling that there are no genuine issues of material fact in the case. *Id.*

B. Appellants' Contentions

On appeal, Hercules contends that because disputed issues of material fact exist, the Claims Court committed reversible error by granting summary judgment with respect to its contractual claims based upon the theories of superior knowledge, reverse warranty, and an implied warranty of specifications. Thompson also contends that the existence of disputed material facts precluded summary judgment with respect to its contractual claims based upon the theories of superior knowledge and an implied warranty of specifications. Thompson further contends that the Claims Court erred as a matter of law in holding (i) that an implied-in-fact contractual obligation for indemnity did not arise under the DPA, and (ii) that such a term—assuming it did arise—would be barred by the Anti-Deficiency Act. Lastly, both Hercules and Thompson contend that the Claims Court erred in holding

that the government contractor defense provided a "separate and independent" basis for denial of their claims.

We have carefully considered all of appellants' arguments on appeal. Having found no errors of law, nor any genuine issues of material fact, we conclude that the Claims Court correctly decided each of the contract based claims asserted by Hercules and Thompson. We affirm the judgments of the Claims Court on that basis and do not reach the issue of whether the government contractor defense would provide a "separate and independent" basis for the court's decision. As will be seen, however, the presence of the government contractor defense is dispositive of two of the contract based claims asserted on appeal. We consider below each of the contract based claims.

C. Analysis

1. *Superior Knowledge*

Hercules and Thompson each argue that because the government had superior knowledge of the dangers associated with dioxin, it had a contractual obligation to inform them of such dangers. Because the government failed to do so, they contend, the government breached its contractual obligation.

> The doctrine of superior knowledge is generally applied to situations where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

American Ship Bldg. Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981). Thus, a claim under the doctrine

of superior knowledge is tenable where the government fails to provide a contractor with vital knowledge in the government's possession which bears upon the costs of the contractor's performance under the contract at issue. That was not the case here.

Hercules and Thompson each argue that summary judgment on this point was improperly granted because disputed factual issues remain concerning whether the type of damages they suffered were "foreseeable" within the meaning of *Hadley v. Baxendale.* Hercules further argues that a disputed factual issue exists regarding the relative levels of knowledge about the hazards of Agent Orange. These alleged disputed issues, however, are immaterial to our decision. Even assuming, *arguendo,* that (i) Hercules' and Thompson's damages were foreseeable, and (ii) the government had superior knowledge of the hazards associated with dioxin, such foreseeability and knowledge had no bearing on Hercules' and Thompson's performance under the contract—i.e., production costs or manufacturing times. Put another way, nothing the government did or failed to do had any impact upon Hercules' and Thompson's production of Agent Orange. As the Claims Court noted, the cases cited for the superior knowledge doctrine concern the withholding of superior knowledge that makes it more difficult to perform under the terms of the contract at issue. *Hercules,* 25 Cl. Ct. at 622-23; *Wm. T. Thompson,* 26 Cl. Ct. at 22-23. *See, e.g., Helene Curtis Indus., Inc. v. United States,* 312 F.2d 774 (Ct. Cl. 1963). We decline to accept Hercules' and Thompson's invitation to extend the doctrine of superior knowledge to encompass their claims for post-performance settlement and litigation expenses, because those expenses were not incurred during the performance of the underlying contracts.

2. *The Implied Warranty of Specifications*

Both Hercules and Thompson argue for recovery based upon a theory of an implied warranty of specifications,

as set forth in *United States v. Spearin*, 248 U.S. 132 (1918), and its progeny. *Spearin* stands for the proposition that when the government includes detailed specifications in a contract, it impliedly warrants that (i) if the contractor follows those specifications, the resultant product will not be defective or unsafe, and (ii) if the resultant product proves defective or unsafe, the contractor will not be liable for the consequences. *Spearin*, 248 U.S. at 136-37. As with any contract-based claim, however, to recover for a breach of warranty, a plaintiff must allege and prove (1) that a valid warranty existed, (2) the warranty was breached, and (3) plaintiff's damages were caused by the breach. *San Carlos Irrig. and Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989); *accord Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965) (stating that a plaintiff asserting a claim for breach of an implied warranty of specifications has the "burden of establishing the fundamental facts of liability, causation, and resultant injury."). Unlike the superior knowledge doctrine, discussed above, the implied warranty of specifications covers problems arising after performance of the underlying contract. *See Poorvu v. United States*, 420 F.2d 993 (Ct. Cl. 1970).

In the present case, Hercules and Thompson argue that because the government supplied the specifications and formula for Agent Orange, the government is liable for their injuries by reason of the breach of an implied warranty of specifications, even though the alleged harm (i.e., costs incurred in the Agent Orange litigation) occurred several years after completion of the Agent Orange production contracts. Both Hercules and Thompson contend that summary judgment was improperly granted because various factual issues remain in dispute with regard to their claims, including (i) whether an implied warranty arose out of the contracts, (ii) whether the type of damages sought were "reasonably foreseeable" at the time the contracts were formed, (iii) whether,

leaving aside the government contractor defense, Hercules and Thompson faced potential liability in the Agent Orange litigation, (iv) whether the government knew that Hercules and Thompson faced potential liability, (v) whether the government's defective specifications gave rise to their alleged potential liability, and (vi) whether the class action settlement constituted reasonable conduct in light of the potential liability.

We need not, however, resolve the above factual issues because a necessary element of appellants' breach of warranty claims—i.e., causation—is lacking. As noted above, to make out a *prima facie* case of breach of an implied warranty of specifications, Hercules and Thompson must show not only that the facts support an implied warranty, but also that the warranty was breached and that their damages were caused by the breach. *San Carlos*, 877 F.2d at 959. As seen above, as far as damages to the extent of contributions to the Agent Orange settlement fund are concerned, the Claims Court held that Hercules' and Thompson's claims failed because (i) the absence of scientific evidence regarding the consequences of dioxin exposure precluded a finding that the warranty was breached, (ii) even assuming the existence of an implied warranty of specifications, the warranty would not include the kind of indemnity sought here, and (iii) the availability of the government contractor defense precluded a finding that their damages were caused by the alleged breach. *Hercules*, 25 Cl. Ct. at 626-28; *Wm. T. Thompson*, 26 Cl. Ct. at 26-28. We agree with the Claims Court that the record from the Agent Orange litigation is sparse with respect to scientific proof that the veterans' injuries were caused by dioxin. We also agree with the Claims Court that the facts would have to be stretched to support the theory that, under an implied warranty or specifications, Hercules and Thompson would be entitled to recover from the government their contributions to the

Agent Orange settlement fund.[8] However, we prefer to rest our decision on the third ground articulated by the court: Hercules and Thompson cannot prove that their damages were caused by the government's alleged breach of an implied warranty of specifications because they

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[8] This view is based on the rationale underlying the Supreme Court's decisions in *Feres v. United States*, 340 U.S. 135 (1950), and *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977). In *Feres*, 340 U.S. 135 (1950), the Supreme Court held that the United States may not be sued in tort for injuries incurred by a serviceperson while on active duty. The Supreme Court had occasion in *Stencel Aero* to explicate the *Feres* decision in the context of service-related injuries allegedly caused by the actions of a government contractor. In *Stencel Aero*, an injured serviceman sued the manufacturer of his malfunctioning fighter plane on a product liability theory. Stencel Aero Engineering Corp. (Stencel Aero), the manufacturer, cross-claimed against the government for indemnity, claiming that any malfunction of its product was caused by defective, government-supplied specifications and components. Holding that the considerations relevant in *Feres* controlled the outcome of the case before it, the Supreme Court upheld the district court's grant of summary judgment for both the government and Stencel Aero against the serviceman, as well as the dismissal of Stencel Aero's cross-claim against the government. The Court reasoned that to allow an injured serviceperson to circumvent the *Feres* doctrine by suing a government contractor, who would then sue the government for indemnity, would have the same deleterious results as allowing tort suits directly against the government in the military context. *Stencel Aero*, 431 U.S. at 673. Thus, the Supreme Court determined that "[t]o permit [the serviceperson] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door." *Id.* (citations omitted).

Neither Hercules nor Thompson has asserted that any provisions of their respective contracts support the argument that the government agreed to indemnify them for third party tort claims. Absent any express provision, such an agreement to indemnify would have to be implied-in-fact. *See Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 714-15 (Fed. Cir. 1988). In view of the *Feres-Stencel Aero* doctrine, it is difficult to envision the circumstances under which a court could find an implied-in-fact agreement on the part of the government to provide the kind of indemnity for which Hercules and Thompson argue.

were protected from liability to the Agent Orange plaintiffs by the government contractor defense.

The Supreme Court explained the government contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In *Boyle*, a serviceman was killed during a training exercise due to an alleged design defect in his aircraft. Boyle's personal representative (Boyle) brought a diversity action in federal district court against the government contractor that had manufactured the aircraft, but did not sue the government. Boyle alleged, *inter alia*, under Virginia tort law, that the contractor had defectively designed the aircraft's emergency escape-hatch system. The contractor contended that it had manufactured the escape-hatch system in accordance with government-supplied specifications as required by the contract, and therefore was not liable to Boyle. The jury returned a general verdict for Boyle, and the district court denied the contractor's motion for judgment notwithstanding the verdict. The United States Court of Appeals for the Fourth Circuit reversed and remanded with directions that judgment be entered for the contractor. The Fourth Circuit found, as a matter of federal law, that the contractor could not be held liable for the allegedly defective design because it had satisfied the requirements of the government contractor defense.

The Supreme Court granted certiorari, and held that where a government contractor has satisfied the requirements of the government contractor defense, as set forth in the *Boyle* opinion, the contractor cannot be held liable under state tort law, because to allow liability would frustrate specific objectives of federal legislation. Although Boyle's claim was asserted on the basis of state law, the Supreme Court concluded that "the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is one between private parties." *Boyle*,

487 U.S. at 506.[9] In cases where the government's interest is implicated, the Supreme Court continued, federal law will displace state law if there is a significant conflict between a federal policy and the operation of state law. *Id.* at 507. Looking to the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1988) (hereinafter, FTCA)[10], the Court reasoned that such a significant conflict was present under the circumstances, because to allow Boyle's suit against the contractor would constitute judicial second-guessing of decisions that Congress intended to be within the discretion of the U.S. military. *Id.* at 511.[11] To further define the contours of the government contractor defense, the Supreme Court in *Boyle* set forth the following three-part test:

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[9] The Court explained:

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

Boyle, 487 U.S. at 507.

[10] In relevant part, the discretionary function exception to the FTCA states that the limited waiver of sovereign immunity in the FTCA does *not* extend to

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1988).

[11] The Court stated:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512. A contractor who satisfies this test is immune to tort liability under state law for defects in products manufactured for the government in accordance with government-supplied specifications.

As seen above, prior to *Boyle*, the district court and the Second Circuit each concluded that the government contractor defense operated to shield Hercules and Thompson. *See In re "Agent Orange"*, 565 F. Supp. at 1273-74 (1983 decision initially granting summary judgment in favor of Hercules and Thompson and two other Agent Orange manufacturers); *In re "Agent Orange"*, 611 F. Supp. at 1263 (1985 decision granting all the manufacturers summary judgment against the opt-out

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> guessing" of these judgments, see *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984), through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.

Boyle, 487 U.S. at 511-12 (footnote omitted).

plaintiffs following the Agent Orange litigation settlement); and *In re "Agent Orange,"* 818 F.2d at 189 (1987 court of appeals decision affirming summary judgment against the opt-out plaintiffs). Thus, Hercules and Thompson successfully argued on three separate occasions that the government contractor defense shielded them from liability for the veterans' tort claims. Consequently, there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed against Hercules or Thompson.

Because the government contractor defense provided a complete defense to the veterans' tort claims, it cannot be said that the damages asserted by Hercules and Thompson were caused by the government, as the Claims Court recognized. As far as their contributions to the settlement fund are concerned ($18,772,568 in the case of Hercules and $3,096,597 in the case of Thompson), it was appellants' voluntary decision to enter into the settlement that led to those damages. The government did nothing to encourage or compel Hercules and Thompson to settle. It was appellants' decision to forego litigating the issue of the government contractor defense to completion that caused them to incur the monetary injury of the contribution to the settlement fund.

Based upon the theory of an implied warranty of specifications, Hercules and Thompson also contend that they are entitled to recover the attorney's fees which they incurred in the Agent Orange litigation. As seen above, in rejecting this element of appellants' claims, the Claims Court relied upon *Kania v. United States,* 650 F.2d at 269. In that case, Eugene Kania brought an action in one of this court's predecessors, the Court of Claims, in which he alleged that the government had breached a contract pursuant to which it had agreed not to prosecute him in return for his testimony before a federal grand jury. After he testified in the grand jury, Kania was

indicted for various offenses. He was successful, however, in his efforts to have the indictment dismissed, based upon his purported agreement with the government. After the dismissal, he sued in the Court of Claims seeking to recover the expenses incurred in defending against the government's charges. The Court of Claims held that it was without jurisdiction because, whatever arrangement existed between Kania and the government, "there was no contract sufficient to satisy this court's jurisdictional requirements." *Kania,* 650 F.2d at 269. The court then went on to state:

> Should this be in error, we must now add that jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases. *William Green Construction Co. v. United States,* 201 Ct. Cl. 616, 477 F.2d 930 (1973), *cert. denied,* 417 U.S. 909, 94 S. Ct. 2606, 41 L.Ed.2d 213 (1974). Courts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made. *Northern Helex Co. v. United States,* 207 Ct. Cl. 862, 524 F.2d 707 (1975), *cert. denied,* 429 U.S. 866, 97 S. Ct. 176, 50 L.Ed.2d 146 (1976).

In light of *Kania,* even assuming the existence of an implied warranty of specifications in this case, such a warranty could not be construed to encompass a warranty by the government that Hercules and Thompson would not have to pay to defend themselves against tort claims that lacked merit because a legal doctrine, such as the government contractor defense, provided a defense to them. In the Claims Court, Hercules and Thompson alleged no facts suggesting that such a warranty—which would have to exist in order for Hercules and Thompson to recover their attorney's fees from the Agent Orange litigation—was "directly in contemplation" when Hercules and

Thompson entered into their respective contracts with the government. *Kania,* 650 F.2d at 269.

3. *Reverse Warranty*

Hercules argues that the government had an implied-in-fact contractual obligation to use the Agent Orange produced by it in a manner so as to avoid potential risks to servicemen and the subsequent tort suits against appellants. A material issue of fact exists, Hercules asserts, as to whether this obligation arose when the government ordered Hercules to package Agent Orange in drums marked only with an orange band, thus precluding Hercules from applying the extensive warnings and instructions normally placed on its commercial herbicides. According to Hercules, because it was not permitted to place adequate warnings on the Agent Orange containers, the government thereby warranted to Hercules that the government's use of the product would take into account the absence of warnings and instructions designed to assure the product's safe use. Alternatively, Hercules asserts that a material issue of fact exists as to whether the government's mixing of Hercules' dioxin-free Agent Orange with dioxin-tainted Agent Orange imposed potential liability on Hercules that otherwise would not have existed. In so mixing, Hercules argues, the government assumed obligations that properly include compensating it for liabiliites incurred as a result of such conduct. Hercules further contends that courts have recognized the existence of an implied-in-fact warranty running from the purchaser to the seller where the purchaser has engaged in conduct which warrants the imposition of a duty to exercise due care in using a seller's product. The Claims Court characterized Hercules' claim as being based on a "reverse warranty" theory. *Hercules,* 25 Cl. Ct. at 624.

Irrespective of the name used to identify the theory advanced by Hercules, we rejected a similar claim in *Lopez v. A.C. & S., Inc.,* 858 F.2d 712 (Fed. Cir.

1988), *aff'g* 649 F. Supp. 149 (W.D. Wash. 1986). In *Lopez*, a civilian employee exposed to asbestos at a naval shipyard brought an action in the United States District Court for the Western District of Washington against several manufacturers who had supplied the asbestos pursuant to a government contract. Upon settling the employee's claim, the asbestos manufacturers filed third-party complaints in the district court, based in part on the Little Tucker Act, 28 U.S.C. § 1346, seeking to recover their settlement payments and litigation expenses from the government. The manufacturers' Tucker Act claims were based on the theory that in specifying asbestos, the government impliedly warranted to the asbestos manufacturers that its use of their product would not expose the manufacturers to unforeseen defective product liabilities to persons who might be injured by exposure to the asbestos. *Lopez*, 858 F.2d at 714. In dismissing the Tucker Act claims, the district court held that such claims were barred by operation of the Anti-Deficiency Act, 31 U.S.C. § 1341. *Lopez*, 649 F. Supp. at 159. As an alternative basis, the district court dismissed the manufacturers' claims for lack of jurisdiction, noting that jurisdiction under the Tucker Act extends only to claims arising out of express or implied-in-fact contracts, and not to claims arising out of implied-in-law contracts. *Id.* The district court concluded that no express contract term existed and that, as a matter of law, the vendor/vendee relationship between the manufacturers and the government, standing alone, did not create an implied-in-fact agreement by the government to indemnify the manufacturers for injuries resulting from the use of the asbestos purchased under the contract. *Id.* at 160. We affirmed the district court's dismissal of the manufacturers' Tucker Act claims on the grounds that the Tucker Act did not provide for claims based on contracts implied-in-law, and that an implied-in-fact warranty running from the government to the manufacturers was a "bizarre and novel" theory that could not be inferred from the circumstances of the case. *Lopez*,

858 F.2d at 714-15, 716-17.[12] Although the *Lopez* decision did not go so far as to hold that a claim for breach of reverse warranty could never be brought under the Tucker Act, it made clear that any such warranty would have to be either express or implied-in-fact, rather than implied-in-law. *Id.* at 716.

Hercules has not alleged an express reverse warranty. Beyond that, we are hard-pressed to see how the circumstances of this case could support an inference that Hercules and the government came "to a meeting of the minds and [took] upon themselves [the] corresponding obligations and liabilities" that would accompany a warranty running from the purchaser to the seller. *Hercules*, 25 Cl. Ct. at 624 (citing *Hirschmann v. United States*, 11 Cl. Ct. 338, 342 (1986)).[13] We prefer, however, to rest our decision on this point on the government contractor defense. Even assuming that an implied-in-fact reverse warranty could be found and could be said to have been breached, Hercules' claim fails for the same reason that Hercules' and Thompson's claims based upon an implied warranty of specifications fail. Specifically, in view of the government contractor defense, Hercules could not prove that its damages were caused by the breach of such a warranty. Rather, Hercules' damages were the result of its decision to enter into the settlement with the Agent Orange plaintiffs.[14]

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[12] Because of our doubts regarding the conclusion that the Anti-Deficiency Act barred the manufacturers' Tucker Act claims, we chose not to rest our decision in *Lopez* on that ground.

[13] In view of the *Feres-Stencel Aero* doctrine, it is difficult to envision the circumstances under which a court could find on the part of the government the kind of implied-in-fact reverse warranty for which Hercules argues. *See supra* note 8.

[14] Just as it did in connection with the implied warranty of specifications theory, the rationale of *Kania* bars Hercules' claim under a theory of reverse warranty for the recovery of attorney fees and expenses incurred in the Agent Orange litigation.

4. *Implied-in-fact Contractual Obligation to Indemnify*

The government used the authority provided in section 101 of the DPA, 50 U.S.C. app. § 2071(a) (1964), to require both Hercules and Thompson to enter into contracts to produce Agent Orange for the Vietnam War effort. Based upon this fact, Thompson, but not Hercules, argued in the Claims Court that, pursuant to section 707 of the DPA, 50 U.S.C. app. § 2157 (1964), it was entitled to be indemnified by the government for its contribution to the Agent Orange settlement fund and for the expenses which it incurred in the Agent Orange litigation. The Claims Court rejected this argument. In so doing, it relied upon the reasoning of the district court in the Agent Orange litigation. *Wm. T. Thompson,* 26 Cl. Ct. at 28. There, in approving the 1984 settlement, the district court rejected the contention of the defendants that the Agent Orange plaintiffs were barred from asserting any claims against them because they were immunized from suit under section 707 of the DPA. *In re "Agent Orange,"* 597 F. Supp. at 844. The district court held that section 707, which states in part that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act," did not provide the immunity asserted by the Agent Orange defendants. 597 F. Supp. at 844-45. The district court stated:

> the protection afforded by section 707 should correspond to the risk imposed, viz., the possible need for the contractor to break its contracts with third parties or the increased risk to employees or users posed by the speeded up production.

597 F. Supp. at 845.

On appeal, Thompson contends that under the circumstances of the compelled production here, section 707 of

the DPA operated to create an implied-in-fact obligation on the part of the government to indemnify Thompson for the damages it incurred: its contribution to the Agent Orange settlement fund and the expenses which it incurred in the Agent Orange litigation. Thompson argues that the Claims Court erred in accepting the reasoning of the district court. Specifically, Thompson contends that because section 101 of the DPA authorizes the President to compel contract performance as well as contract acceptance, the "risk imposed" is not limited to breach of contract actions arising out of preference given to DPA contracts, but rather extends to possible tort suits by third parties arising from subsequent use of the product produced under the DPA contract.

We disagree. As did the district court in Agent Orange litigation and the Claims Court in this suit, we read section 707 of the DPA as providing a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements. Section 707 does not provide the kind of protection asserted by Thompson.[15]

In interpreting a statute, we first turn to its language. *VE Holding Co. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) (citing *Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 300-01 (1989)), *cert. denied*, 111 S. Ct. 1315 (1991). Accordingly, we begin our analysis with the pertinent statutory provisions: sections 101 and 707 of the DPA. Section 101(a) of the DPA states:

> The President is hereby authorized (1) to require that performance under contracts or orders (other

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[15] The circumstances of this case do not require us to address the holding of the district court that "the protection afforded by section 707" serves to protect DPA contractors against "the increased risk to employees or users posed by . . . speeded up production." *In re "Agent Orange"*, 597 F. Supp. at 845.

> than contracts of employment) which he deems necessary or appropriate to promote the national defense *shall take priority* over performance under any other contract or order, and, *for the purpose of assuring such priority,* to require acceptance and performance of such contracts or orders *in preference* to other contracts or orders by any person he finds capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 U.S.C. app. § 2071(a) (1964) (emphasis supplied).

Section 707 of the DPA states as follows:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

50 U.S.C. app. § 2157 (1964).

The language of section 101(a) makes it clear that the purpose of the statute is to authorize the President to dictate that preference be given to government contracts which are necessary to promote the national defense. Indeed, section 101 is titled "Priority in contracts and orders." Although Thompson correctly observes that

the statute authorizes the President to compel both contract performance and contract acceptance, section 101 (a) expressly states that the granting of such authority is "for the purpose of assuring . . . priority." Significantly, section 101(a) does not mention either the specific nature of performance under a DPA contract, or the subsequent use of goods produced under such a contract. Therefore, we conclude that, while the risk imposed by section 101 (a) does include the possible need of a contractor to break its contracts with third parties in order to give preference to a DPA contract, it does not include the risk that the product produced under the DPA contract will be inherently unsafe to users.

Once a contractor has been compelled to accept a national defense contract under section 101(a), section 707 acts to shield the contractor from liability resulting from compliance with that section. At issue in this case is the nature of the liability against which the contractor is shielded.

As noted above, in complying with DPA section 101(a) a contractor may have to re-prioritize its outstanding contracts in order to give the required preference to a compelled DPA contract. It stands to reason that the protection provided by DPA section 707 extends only to shield a contractor from breach of contract liability arising as a consequence of such re-prioritization. First, it is a settled rule of statutory interpretation that separate provisions of a statute are to be construed and interpreted together and in light of each other to ascertain the true legislative intent. This court has explained:

> When the legislative purpose is incorporated in a complex piece of legislation, such as those establishing a major regulatory or entitlement program, the meaning of any particular phrase or provision cannot be securely known simply by taking the words out of context and treating them as self-evident. This rather straightforward homily is captured in the more

> pretentious proposition that parts of a statute *in pari materia* must be construed together.

Amendola v. Secretary, Dep't of Health and Human Servs., 989 F.2d 1180, 1182 (Fed. Cir. 1993); *accord Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984) (stating that where two statutory provisions are enacted *in pari materia*, a legislative intent to have the provisions "work harmoniously together" is to be inferred). To hold that section 707 protects contractors against a risk which is greater than that created by the statute with which it operates would violate this rule.

Furthermore, the language of section 707 itself supports the conclusion that the section does not extend the kind of indemnity asserted by Hercules. The second sentence of section 707, which prohibits discrimination "against contracts to which priority is assigned . . . ," reinforces the view that the immunity from suit provided by section 707 does not extend to tort suits in which it is alleged that the item produced by the DPA contractor is inherently unsafe to users. Rather, we conclude that to the extent relevant here, the intended protection of section 707 is analogous to that provided under the common-law doctrine of impossibility of performance, which excuses delay or nonperformance of a contract when the agreed upon performance has been rendered "commercially impracticable" by an unforeseen supervening event not within the contemplation of the parties at the time the contract was formed. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976) ("[DPA section 707] is simply declaratory of the common law [doctrine of impossibility].") (quoting *United States v. Texas Construction Company*, 224 F.2d 289, 293 (5th Cir. 1955)). We also agree with the district court, *see In re "Agent Orange,"* 597 F. Supp. at 845, that if Congress had intended section 707 to impose upon the government the kind of liability asserted

by Thompson, it would have said so in clear and unequivocal terms. *See, e.g., United States v. International Business Machs. Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1988) ("Had Congress intended to make the exemptions permanent, it knew how: it could and we believe would have used words of futurity. . . .").

In sum, the protection afforded by section 707 of the DPA extends no further than the risk imposed by section 101(a) of the DPA. Accordingly, invocation of the DPA by the government for the production of Agent Orange did not give rise to an implied-in-fact contractual obligation on the part of the government to indemnify Thompson for its contribution to the Agent Orange settlement fund or for the expenses which Thompson incurred in the Agent Orange litigation.

CONCLUSION

For the foregoing reasons, the judgments of the Claims Court are affirmed.

PLAGER, *Circuit Judge*, dissenting.

The story of the litigation stemming from our Government's use of Agent Orange during the Vietnam War is long and complex. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (enlarged ed., 1987). It may be that it is best to put this chapter of our nation's history behind us, and to bury the issues with the dead. Appellants, by bringing this suit, do not allow us that peace. Be that as it may, as a court of law we are obliged to give appellants whatever justice the law affords. I believe the law affords substantially more justice than the majority concedes.

The background of this particular case is set forth in some detail by the majority. Undue attention to trees, however, often hides the forest. Appellants, the Hercules and Thompson chemical companies, manufactured Agent Orange pursuant to contracts made by and with the Government. Indeed, both Hercules and Thompson allege that the contracts were for a product which they did not choose to make, and which they were compelled to produce under penalty of law. The companies, along with others, were sued some years back by veterans and their families (collectively "the *Agent Orange* plaintiffs") for injuries caused by exposure to Agent Orange when the Government used the defoliant in pursuit of its war in Vietnam; appellants claim that the Government should indemnify them for the financial losses they sustained in the settlement of the Agent Orange litigation.

Appellants present a host of arguments founded in government contract law, each of which a majority of this panel rejects. The many points of government contract law raised in this case and so finely parsed, however, should not be allowed to obscure the fundamental question: if the Government compels manufacture of a product by private companies, a product known to the Government to be potentially dangerous, and the use by the

Government of the product causes the manufacturers to incur liability, may the Government claim immunity from the consequences of its conduct? I think not.

1.

The answer the Government gives, and the majority accepts, to this question is that there was no liability for the manufacturers to incur—the manufacturers could not have been held liable for the injuries sustained by the *Agent Orange* plaintiffs because the manufacturers were totally protected by a doctrine known as the government contractor defense. *Slip op.* at 23. The majority concludes from this that the over twenty million dollars paid to the *Agent Orange* plaintiffs by Hercules and Thompson resulted from a "voluntary decision" by the companies. *Slip op.* at 27.

I find that reasoning unpersuasive. While there no doubt are civic-minded individuals in the upper ranks of both companies, and perhaps even among their lawyers, the notion that these manufacturers voluntarily made a twenty million dollar contribution to the veterans of the Vietnam War and their families out of the goodness of their hearts seems rather far fetched, and might even raise questions about their fiduciary obligations to their shareholders.[1]

The trial judge who presided over the settlement, an experienced and well-respected jurist, must have believed there was at least some ground upon which liability could be found. This was not a case in which the parties came to the judge with an agreed settlement, one which the judge without further exploration approved. As the record shows, two trial judges shared this case. The first

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[1] If the companies' lawyers advised that the making of the contribution was necessary, when the law so clearly provided an absolute and airtight defense to liability, there might be a malpractice issue as well.

held that, under the government contractor defense as a matter of law, neither Hercules nor Thompson were liable for the veterans' claimed injuries. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263 (E.D.N.Y. 1983). However, before an order to dismiss was entered by this judge, a second judge assumed the case.[2] The second judge rescinded the first judge's summary judgment for the manufacturers, and denied the motion to dismiss. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y. 1984). This judge must have believed that there was a valid and ongoing "case or controversy," or the court could not have retained jurisdiction over these defendants. This same judge presided over the extensive settlement negotiations conducted in his courthouse. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985); *see also* Schuck, *supra*, at 143 *et seq*. We must assume that this trial judge acted in good faith in a belief that the manufacturers might not be able to escape all liability. It ill behooves the Government, or this court, years later to question whether the trial judge properly understood the law of the case before him.

2.

The majority concludes that, despite what the trial judge may have believed, the Government had no liability to these contractors because of the government contractor defense as explicated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In the majority's view, *Boyle* disposes of appellants' implied warranty of specifications theory because the Supreme Court in *Boyle* in effect immunizes contractors such as these from all liability in situations such as that in the original *Agent Orange* plaintiffs' suit. There are at least two problems with this reasoning.

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[2] Judge George C. Pratt, the judge originally assigned to these cases, was elevated to the Court of Appeals, and his responsibilities as the trial judge were reassigned to Chief Judge Jack Weinstein.

For one, *Boyle* was decided in 1988, some four years after the settlement that is the subject of this suit.[3] Yet the issue as the majority poses it is not whether years later the substantive law of the case might have been found (or might have changed?) to favor the companies, but whether at the time of the settlement the companies simply gave away money to the plaintiffs, or whether they settled under a reasonable apprehension of legal compulsion in order to minimize their (and the Government's) potential liability.

The second reason why *Boyle* is inapposite to this case that the issue and holding in *Boyle* turned on a question of federal preemption, an issue not in this case. The question in *Boyle* is, in a suit on behalf of a deceased military officer against the manufacturer of a product purchased by the military and alleged to have caused the death, a suit which was brought under the substantive law of a particular state, may the Government's manufacturer be held liable under state tort law. The Supreme Court answered no. The suit was brought in Federal Court as a diversity suit with a state cause of action. Although the Government was not the named defendant, the Supreme Court viewed the case as implicating the Federal Tort Claims Act (FTCA), the statute in which Congress waived the Government's immunity from tort liability. *See* 28 U.S.C. § 1346(b). The Supreme Court decided that the discretionary function exemption of the FTCA applied—the design of the escape hatch of the airplane was an exercise of federal discretion, and therefore state law was displaced. *See* 28 U.S.C. § 2680(a).

In the *Agent Orange* litigation, suit was brought by the plaintiffs not as a state tort action under the FTCA, but as a federal law action based on certain federal statutes

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[3] The Agent Orange plaintiffs filed their original suit in July 1978; after extensive pretrial proceedings, trial was set for May 7, 1984. The case was settled that day.

and on case law recognizing, even after *Erie*,[4] a limited scope for federal common law.[5] Jurisdiction was alleged, not in diversity, but under "the common law and/or the statutory laws of the United States of America," as a federal question case under 28 U.S.C. § 1331.[6] The original trial judge held that substantial federal interests were affected by the litigation, and that federal common law provided both the substantive measure of liability and the basis for jurisdiction.[7]

The Second Circuit on appeal reversed the trial judge's ruling on jurisdiction, and held the case was properly in federal court, but on diversity of citizenship jurisdiction.[8] On remand the second trial judge ruled that this did not necessarily affect the substantive law of the case. In an exhaustive opinion he ruled that, as a choice of law rule, the substantive law of the case remained one of federal law: a federal or national consensus common law.[9] Thus the preemption rule—whether federal law supercedes state substantive law in these cases—which was the concern in *Boyle* has no applicability to the *Agent Orange* litigation, a litigation in which federal law defined the substantive standard to be applied.

The difficulty the majority has in finding a satisfactory rationale for the outcome it supports is understandable. The so-called "government contractor defense" is a label

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[4] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[5] *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

[6] *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 737, 740 (E.D.N.Y. 1979).

[7] *Id.* at 744.

[8] *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980).

[9] *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984).

hung on a group of issues which first found expression in *Feres v. United States*, 340 U.S. 135 (1950). In that case the Supreme Court was called upon to decide whether the general waiver of tort immunity contained in the Federal Tort Claims Act gave military personnel the right to sue the Federal Government under routine tort theories in state courts. The Court held that, for a variety of policy reasons, the Act did not apply to injuries incident to military service; military personnel could not sue their employer in state courts.

Later, in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the Court extended *Feres* and held that neither the Government nor the manufacturer were liable to a military pilot for alleged negligence in the design and construction of an airplane's life support system. However, the Court in *Stencel* revisited the policy arguments on which *Feres* stood, and revised its rationale for the result. Thus began a series of cases in which the Court has tried to find a reasoned basis for the military exception rule,[10] culminating in *United States v. Johnson*, in which four members of the Court were of the view that *Feres* had been wrongly decided,[11] and finally *Boyle*, with a different rationale altogether, keyed to the language of the FTCA itself.[12]

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[10] *See, e.g., United States v. Shearer*, 473 U.S. 52 (1985).

[11] *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Justice Scalia, with whom Justices Brennan, Marshall, and Stevens joined, dissenting).

[12] Although the question of government liability to military personnel would seem of direct interest to only a small segment of the legal profession, the *Feres-Stencel-Boyle* cases have generated their share of academic attention, largely critical. One of the most recent and exhaustive reviews is David E. Seidelson, *From* Feres v. United States *to* Boyle v. United Technologies Corp.: *An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 Duq. L. Rev. 219 (1994). *See also* Michael D. Green and Richard A. Matasar, *The Supreme Court and the Prod-*

In light of this history, to suggest that the evolving government contractor defense would clearly dictate the outcome in the original *Agent Orange* litigation seems to me to be unwarranted historical revisionism, out of place in the decision before us in this case. I do not know what the ultimate decision in the *Agent Orange* litigation would have been on this issue, nor does anyone.[13] Since I find unpersuasive the majority's defense of the trial judge's summary judgment on this point, and since I believe there are a number of unresolved fact and law issues, I would return the case to the Court of Federal Claims with instructions to hold a full trial on the issues.

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ucts Liability Crisis: Lessons from Boyle's *Government Contractor Defense*, 63 S. Cal. L. Rev. 637 (1990); Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who is to Guard the Guards Themselves?*, 1989 Duke L. J. 1597; John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U. L. Rev. 1121 (1993).

[13] In its 1987 opinion upholding both the settlement in the original litigation and Judge Weinstein's later dismissal of the 'opt-out' cases, the Second Circuit had to walk a tight line. In effect, the court had to find a cause of action for the one (in support of the trial judge's denial of the motion to dismiss the original defendants), but not for the other (in support of the grant of the motion to dismiss regarding the opt-outs). The Second Circuit opined that "in the light of hindsight, some 15 to 20 years after the fact, the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange, and there cannot have been a breach of an earlier duty to inform the government of known hazards." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 174 (2d Cir. 1987). In like vein the court thought that "defendants clearly did not breach any duty to inform the government of hazards relating to Agent Orange," and thus were protected by the 'military contractor defense.' *Id.* at 178. To the extent those conclusions were invoked as a rationale for affirming the judgments against the opt-out plaintiffs, they are arguably defensible given the burdens of proof and deference owed the trial judge. However, as a basis for initially predicting the eventual outcome of the original litigation, they would be inconsistent with the position taken by Judge Weinstein, and are speculative.

3.

A few remaining observations about the trees. The majority has also rejected appellants' theory of government liability under the doctrine of superior knowledge. If the Government's knowledge is superior to that of the contractor, the Government may incur liability if it fails to disclose information required by the contractor. There are "instances in which the defendant [the Government] is clearly under such an affirmative obligation and cannot remain silent." *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963). The Government had more knowledge of the potential harm caused by Agent Orange than did appellants, who had not participated in the devolopment of, had little experience with, and were relatively ignorant regarding the health hazards posed by, Agent Orange. Thus appellants contend that the Government is responsible for the harms caused to the *Agent Orange* plaintiffs, and that consequently the Government should pay appellants' share of the settlement fund.

The majority disagrees. It understands *American Ship Building Co. v. United States*, 654 F.2d 75 (Ct. Cl. 1981), to require that the Government divulge information *only* when the contractor's ignorance would hinder the contractor's *performance* of the contract. In this case, the costs imposed on the appellants are the result of a settlement reached long after performance had ceased. The majority therefore holds that appellants cannot recover under the doctrine of superior knowledge because the damages arose after performance.

There is neither prior authority nor present reason to limit the doctrine of superior knowledge to require compensation only for difficulties incurred during performance.

> The doctrine of superior knowledge *is generally applied* to situations where (1) a contractor undertakes to perform without vital knowledge of a fact

> that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information. *See, e.g. Helene Curtis Industries, Inc. v. United States,* 160 Ct. Cl. 437, 312 F.2d 774 (1963).

American Ship, 654 F.2d at 79 (emphasis supplied). Contrary to the majority's deployment of the case, nothing in *American Ship* confines the doctrine of superior knowledge to information regarding the performance of contracts. *American Ship* merely notes that the doctrine has *generally* been invoked in cases in which the contractor's performance was hindered because of the Government's failure to divulge information.

The majority differentiates the doctrine of superior knowledge from the doctrine of implied warranty of specification, announced in *United States v. Spearin,* 248 U.S. 132 (1918). The majority acknowledges that, under the latter doctrine, government liability is not limited to contract performance, but extends to later losses as well. *Slip op.* at 20. *Spearin* requires that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Id.,* 248 U.S. at 136. The theory is that the author of a plan detailed enough to comprise specifications often possesses knowledge superior to that of the party who contracts to execute that plan. "Specifications so susceptible of a misleading reading (or implication) subject the [Government] to answer to a contractor who has actually been misled to his injury. *United States v. Spearin,* 248 U.S. 132, 137 (1918)." *Helene Curtis,* 312 F.2d at 778 (citation abbreviated).

However, as the quotation above from *American Ship* indicates, the Court of Claims in *American Ship* relied on

Helene Curtis, which is in turn founded on *Spearin.* The doctrines of superior knowledge and the implied warranty of specification are thus different expressions of a single principle. Both doctrines ultimately rest upon general contract law. If the Government's incomplete or misleading information, or its particular specification of its requirements, imposes losses, now or later, on the contractor, then the Government, like any other contractor, should not escape responsibility. That responsibility may well extend beyond the period of performance of the contract; there is no reason to hold that the doctrine of superior knowledge makes the Government responsible only for hinderances to performance of the contract.

Finally, as noted earlier, the Government compelled appellants to produce Agent Orange under the authority granted by the Defense Production Act (DPA), 50 U.S.C. app. §§ 2061 *et seq.* (1964). The DPA requires manufacturers to accept contracts deemed necessary to the national defense, and further requires manufacturers to give such contracts absolute priority over other obligations. 50 U.S.C. app. § 2071(a) (1964).

The DPA also includes a "hold harmless" provision, 50 U.S.C. app. § 2157 (1964), that states:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . .

The Court of Federal Claims rejected Thompson's argument that § 2157 immunizes the manufacturers from liability for any eventual use of the defoliant.[14] It held that the provision should be read narrowly, to apply only to

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[14] **Interestingly, both Hercules and Thompson alleged in their complaints that they had been compelled under the Defense Production Act to manufacture Agent Orange, but only Thompson briefed on appeal the question of whether the 'hold harmless' clause of the Act applied.**

liability caused by giving the Government its claimed priority for production. Thompson argues that even if that is so, the provision at least supports the conclusion that there is an implied-in-fact obligation on the part of the Government to indemnify Thompson for the damages incurred. The majority agrees with the trial court's reading of the provision, and concludes that the immunity —like the common-law doctrine of impossibility of performance—extends only to contract breaches required by the Government's imposition. From that, the majority concludes that the Government is immune from the claims of the manufacturers.

I have three problems with the majority's reading of the DPA. First, the majority's conclusion is a *non sequitur*: that the Act grants manufacturers immunity against third parties on contractual claims does not suggest, much less require, that the Act grants the Government immunity against manufacturers who suffer other losses.

Second, although justice may be blind, judges should take some cognizance of practical realities. A statute that gives the Government the authority to force private manufacturers to accept contracts and to place such contracts before their other obligations gives the Government substantial operational control over those enterprises. Under the DPA, the Government in effect can seize the company. Congress recognized that reality, and specified a hold harmless clause in the Act.

Third, the majority ignores the language of the statute. The majority argues that "if Congress had intended [the statute] to impose upon the government the kind of liability asserted by Thompson, it would have said so in clear and unequivocal terms." *Slip Op.* at 38. The *Agent Orange* litigation was historic, and was both substantively and procedurally unimaginable at the time of the passage of the Defense Production Act. We should not expect Congress to have specifically described a liability

problem arising from a judiical process of which they could have had scant idea. Yet if Congress intended to limit the sweeping scope of the hold harmless provision to contract performance only, Congress could have written, for example, "No person shall be held liable for *breach of contractual obligations* caused by any act or failure to act, etc." That is not the language of the statute. It is difficult to imagine more "clear and unequivocal" terms than that actually used by Congress: *"No person shall be held liable for damages* or penalties for any act or failure to act resulting *directly or indirectly* from compliance with a rule, regulation, or order issued pursuant to this Act . . ." 50 U.S.C. app. § 2157 (1964). The law as well as the circumstances support the Government's liability.

4.

Over the past several years the parties to this litigation and the courts have expended much effort phrasing the issues presented by this case in terms of government contract law. As the preceding discussion suggests, however, the conceptual grammar of government contract law may be inadequate to the task. Because the relationship between appellants and the Government was never arms-length, any discussion of that relationship in doctrinal terms that presume freedom of contract is incoherent.

The twenty million dollars or so at stake in this litigation may be small potatoes to the Federal Government, and we do not know how much the money means to the financial health of appellants. But if there ever is a case in which we can fairly say, it is not the money, it is the principle that matters, this is the case. At the core of this litigation is the way in which our nation distributes the burden of its military activity among its citizens. In wartime, that burden is inevitably distributed unevenly. We cleave to the Constitution, however, in spite of unfairness. The Constitution provides an apt analogy—the Takings Clause of the Fifth Amendment is "designed

to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The question in this case is whether the public should pay for the damages that the federal judiciary has attributed to the use of Agent Orange in Vietnam, or whether appellants alone should bear the burden.

The Government took away appellants' control over their businesses. By assuming control, the Government deprived appellants of their ability to conduct themselves prudently, and instead forced appellants to engage in a dangerous enterprise, the manufacture of Agent Orange. In exposing appellants to risk, the Government incurred an obligation to make appellants whole should the danger come to pass. The danger of the Government's use of Agent Orange is now clear, or as clear as our law can make it. Equally clear is the Government's obligation to indemnify appellants. No amount of niggling at doctrine can obscure that simple truth.

I respectfully dissent.

IN THE UNITED STATES CLAIMS COURT

No. 90-496C

(Filed: Apr 2 1992)

HERCULES INCORPORATED

v.

THE UNITED STATES

Contracts; Agent Orange; implied-in-fact contract terms; Government contractor defense; indemnification.

OPINION

Yock, *Judge.*

This contractual dispute is before the Court on the defendant's motion for summary judgment, filed pursuant to USCC Rule 56.[1] For the reasons stated herein, the defendant's motion for summary judgment is granted, and plaintiff's complaint will be dismissed.

Facts

Plaintiff, Hercules Incorporated (Hercules), was a manufacturer in the mid to late 1960's of a product known as Agent Orange, which was used for military purposes by the United States Government as a defoliant

[1] Defendant has, in the alternative, moved to dismiss, pursuant to USCC Rule 12.

during the Vietnam War. Years later, Vietnam veterans and their families, alleging that exposure to Agent Orange caused death, injuries, and birth defects, sued all the Agent Orange manufacturers, including Hercules. This multi-district product liability tort suit was settled before trial, *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter *"Settlement Opinion"*), 597 F. Supp. 740 (E.D. N.Y. 1984), *aff'd,* 818 F.2d 145 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988), and Hercules was required to pay some $18 million of the total settlement amount. The instant contract suit was brought by Hercules in an attempt to recover from the United States Government the costs it incurred in defending and settling the suit in the district court.

The following facts are essentially uncontroverted: Agent Orange is a mixture of two phenoxy herbicides, 2,4-Dichlorophenoxyacetic Acid (2,4-D), and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T) in a 50/50 blend. Depending on the process utilized, when 2,4,5-T is produced, it may contain varying amounts of 2,3,7,8-Tetrachlorodibenzo-p-dioxin (dioxin), a toxic substance, although not a key ingredient of either Agent Orange or 2,4,5-T.[2]

As one court noted, "the government and the military had a considerable amount of knowledge about 2,4,5-T, about dioxin, and about the hazards associated with both." *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter "*Agent Orange*"), 565 F. Supp. 1263, 1266 (E.D. N.Y. 1983). This knowledge extended back into the 1950's, and the level of knowledge increased rapidly during the mid to late 1960's. Much of the Government's knowledge was classified and not shared with the chemical companies. *Id.* at 267-68. However, some of the bigger chemical companies that were producing Agent Orange

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[2] While it has not been proven scientifically or legally, the Vietnam veterans believed that exposure to Agent Orange caused cancer and birth defects, and this was allegedly caused by the dioxin present in this defoliant.

for the military, including Hercules, did develop a considerable amount of knowledge about the dangers associated with the production of 2,4,5-T and the dioxin contained therein during this same time frame.

Hercules began producing phenoxy herbicides that contained 2,4,5-T by itself, or in a mixture with 2,4-D in 1961,[3] the same year the Government began to use a variety of phenoxy herbicides in Southeast Asia to defoliate trees and plant life to eliminate possible hiding places for the Viet Cong and the North Vietnamese troops.[4]

As the Vietnam War progressed, the military needed greater amounts of Agent Orange, which Hercules supplied to the Government through fifteen contracts between May 8, 1964, and May 20, 1968. These contracts specified the formula for producing Agent Orange, and Hercules, which apparently provided no input to the Government with respect to either developing or modifying these specifications, complied with the specifications. In early 1965, during a meeting called by Dow Chemical Company, Hercules was notified of industrial health problems associated with the production of 2,4,5-T, and, later that year, it modified its process of production to eliminate the dioxin contamination. *Agent Orange*, 565 F. Supp. at 1269, 1274.[5] Thereafter, from 1966 through 1970, Her-

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[3] Reasor-Hill Corporation, which was purchased by Hercules in 1961, produced herbicides containing 2,4,5-T or 2,4-D beginning in the early 1950's.

[4] The defoliant Agent Orange and Hercules' commercial herbicides were of different concentrations and were applied differently. Agent Orange contained roughly twice as much 2,4,5-T per gallon as the typical Hercules herbicide. Also, the Government used Agent Orange undiluted and sprayed at a rate of 3 gallons per acre, as compared to the dilution of Hercules' herbicide at a ratio of 100 to 1, sprayed at a rate of 1 gallon per acre.

[5] The Government was not invited to that meeting, and there was evidence that Dow feared Government intervention into, and control of, the entire herbicide industry. *Agent Orange*, 565 F. Supp. at 1269.

cules' product contained no measurable dioxin. *Id.* However, the Government mixed the dioxin-free Agent Orange produced by Hercules with the dioxin-contaminated Agent Orange produced by other manufacturers, and these mixtures were sprayed by the military in the Southeast Asia war zone.

Some ten years later, starting in 1979, Vietnam veterans, or their estates, began filing negligence and strict liability tort actions against the chemical companies that produced Agent Orange for the Government. According to these plaintiffs, in view of the toxicity of dioxin, exposure to the Agent Orange that contained dioxin caused cancer, miscarriages, and birth defects. These actions were consolidated in the Eastern District of New York under the heading MDL No. 381.

On May 20, 1983, Hercules was granted summary judgment, based upon the district court's finding that the plaintiff's Agent Orange product was dioxin free, so Hercules had no knowledge of harm from dioxin contamination, and thus did not know more than the Government about the hazards associated with the use of its product. *Agent Orange,* 565 F. Supp. at 1274. Unfortunately for Hercules, the granting of summary judgment was reversed by the succeeding district court judge approximately five months later, and Hercules was again made part of the litigation, along with all the other manufacturers of Agent Orange.

On May 7, 1984, the date trial was to begin, the parties reached a settlement, and a $180 million settlement fund was created. *Settlement Opinion,* 597 F. Supp. at 748. The district court judge, weighing the potential costs as well as the uncertainties associated with trial for both sides, found that the proposed settlement was fair, reasonable, and adequate. However, he did note that plaintiffs *had never* produced any persuasive evidence showing a causal relationship between the exposure to small quantities of dioxin found in Agent Orange and the

claimed injuries. *Id.*, 597 F. Supp. at 782-95. The district court's settlement opinion was affirmed, and the appeals court noted that it was "essentially a settlement at nuisance value," based on the "grave weaknesses in plaintiffs' case," since "the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 171, 174 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Hercules' share of the settlement was $18,772,568, which it paid into the settlement fund in 1984. According to Hercules, it also spent over $6 million in legal fees during the Agent Orange litigation.

Nearly 300 plaintiffs had previously opted out of the class action suit, and thus were not bound by the May, 1984 settlement. Hercules and other Agent Orange manufacturers successfully moved for summary judgment against these remaining plaintiffs. *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter *"Opt-out Opinion"*), 611 F. Supp. 1223 (E.D. N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The district court judge found that (1) plaintiffs failed to present credible evidence as to causation, and that (2) the plaintiffs' claims were barred by the Government contractor defense.[8] *Id.*, 611 F. Supp. at 1229, 1258-63. The appeals court affirmed, based upon the Government contractor defense, and also agreed that "the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 190 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

The plaintiff filed its complaint with this Court on June 8, 1990. In this suit, plaintiff seeks contractual in-

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[8] **The court also found that no individual plaintiff could prove which defendant chemical company had manufactured the Agent Orange to which he allegedly had been exposed.**

demnification from the Government of the amounts plaintiff paid in settlement of the veterans' class action suit, legal fees, expenses, and costs in connection with defending all of the Agent Orange suits brought against it and "all other financial and consequential damages caused by the defendant's breach of its contractual warranties and duties." In response, the Government filed a motion for summary judgment on January 8, 1991, seeking dismissal of the plaintiff's contract suit as a matter of law. The plaintiff opposes the motion and asserts that the matter should move forward to trial.

Discussion

"Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *GAF Corp. v. United States,* 91 Cl. Ct. 490, 496 (1990), *aff'd,* 932 F.2d 947 (Fed. Cir. 1991), *cert. denied,* 117 L. Ed. 2d 131 (1992). The substantive law involved in the suit determines which facts are material, and only disputes over material facts, those which might affect the outcome of the suit under the governing law, may properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Disputes over facts that are not relevant under the controlling law will not prevent the entry of summary judgment. *Id.* The moving party, in this case the defendant, has the burden of establishing that there are no genuine issues of material fact, *Celotex Corp. v. Catrett,* 477 U.S. 317, 321 (1986), and that it is entitled to judgment as a matter of law. *GAF Corp.,* 19 Cl. Ct. at 496. For the following reasons, this Court finds that the Government has met its burden of establishing that there are no genuine material issues of fact in dispute and that it is entitled to judgment as a matter of law.

In its complaint, the plaintiff has alleged that it is entitled to contractual indemnification from the Govern-

ment under four counts. All four of the counts are based on alleged breaches of implied-in-fact contract obligations. Plaintiff submits that it produced Agent Orange in the 1960's under written contracts with the Government that contained detailed design specifications that were developed solely by the Government. It contends further that it had no part in the development of the specifications, that it manufactured the Agent Orange to the exact specifications ordered by the Government, and that it had little, if any, knowledge about the potential hazards that were inherent in the product as produced and used by the Go ernment. Given these factual circumstances, the plaintiff argues that it is entitled to indemnification in contract for the losses it incurred in defending against and settling the tort suits brought by the Vietnam veterans and their families against the manufacturers of Agent Orange. Hercules believes it is only equitable and fair that the Government assume the obligation and be allocated these risks because it ordered the production of Agent Orange to its own specifications, completely controlled the use (or misuse) of the product, and never shared any information about potential hazards in the product with the manufacturer. In short, if anyone was negligent here, it was the Government and the financial liability should, therefore, be borne by it and not by the innocent manufacturers of Agent Orange. The plaintiff, therefore, contends that it is entitled to be indemnified by the Government for the costs it incurred under any one of four implied-in-fact contractual theories.

The plaintiff's first theory involves the matter of the Government's alleged superior knowledge. Here, the plaintiff asserts that there was an implied-in-fact obligation on the part of the Government to reveal its *superior knowledge* concerning the unprecedented military use of Agent Orange by the Government so as to not increase the plaintiff's cost of performance under the contract.

The second theory alleged is a straight forward duty on the part of the Government "to exercise *good faith*

and not increase Hercules costs by using Agent Orange in Southeast Asia in an unprecedented military manner that failed to avoid potential health risks, including by not taking adequate precautions and safeguards or providing * * * adequate warnings * * *." (Emphasis added.)

The third theory alleged by the plaintiff would place a duty on the Government to *use* the plaintiff's product after production in a way that would avoid potential health risks and thus avoid harming the plaintiff. This is the so-called reverse warranty obligation on the part of the Government.

Fourth and finally, the plaintiff alleges a warranty of specification theory. This theory is based upon an alleged Governmental breach of its implied-in-fact contractual obligation "to establish specifications and requirements for Agent Orange sufficient to make Agent Orange adequate and suitable for the unprecedented intended and actual military use to which it was put in Southeast Asia * * *."

The defendant, for its part, opposes each one of the plaintiff's four breach of implied-in-fact contract arguments on factual as well as legal grounds. In addition, the defendant asserts that the rationale surrounding the Government contractor defense supplies an independent legal basis for finding in its favor. Finally, although not pressed by the Government, since the plaintiff's contractual theories are all based on the concept of contractual indemnification, that matter also will be discussed in the concluding section of this opinion.

After full consideration of the parties' briefs and oral arguments, it is evident to the Court that only the plaintiff's fourth claim regarding the warranty of specification has any potential vitality. The first three claims bear superficial resemblance to viable implied-in-fact contract theories, but, upon closer inspection, they do not meet the requirements established in the appropriate preceden-

tial case law. However, in the interests of completeness, this Court will discuss each of the plaintiff's four contractual claims and defendant's responses to them.

A. *Plaintiff's Implied-In-Fact Contract Claims.*

1. The first three claims.

There is a line of cases which allows Government contractors to recover from the Government the unexpected increased costs of performance of a contract if the Government, at the time the contract was formed, had superior knowledge regarding difficulties in production which were not apparent and were not otherwise known by the contractor. *American Ship Bldg. Co. v. United States*, 228 Ct. Cl. 220, 654 F.2d 75 (1981); *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472, 458 F.2d 1364 (1972); *J.A. Jones Constr. Co. v. United States*, 182 Ct. Cl. 615, 390 F.2d 886 (1968); *Helene Curtis Indus., Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963); *J.F. Shea Co. v. United States*, 4 Cl. Ct. 46 (1983).

From this precedent, the plaintiff argues that the Government is liable to the manufacturers of Agent Orange for their costs in defending and settling the suits brought against them by Vietnam veterans. This is because the Government allegedly knew more about the hazards of dioxin contained in the Agent Orange than did the herbicide manufacturers, and the Government breached its duty (contractual obligation) to reveal this superior knowledge to the plaintiff.

The defendant counters that the plaintiff and its predecessor were experienced manufacturers of 2,4,5-T, and they continued to manufacture 2,4,5-T commercial products the entire time the plaintiff was supplying Agent Orange to the United States. Also, they complied with the general reporting and registration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, 7

U.S.C. §§ 135 *et seq.* (1964) (FIFRA).[7] In view of this, the Government could reasonably assume that the plaintiff had tested its products as required by FIFRA and would be aware of potential hazards associated with 2,4,5-T.

While the determination of how much knowledge both the plaintiff and the Government had about the hazards of dioxin and Agent Orange is fact-intensive and not suitable for summary judgment, this Court believes it is not necessary to reach a decision on this factual issue. In analyzing these cases, it is clear to this Court that the doctrine of superior knowledge covers *only* unexpected costs in the *performance* of the contract. None of the cases cited by the plaintiff involving the doctrine of superior knowledge extend the doctrine beyond the production of the item contracted for, be it disinfectant powder (*Helene Curtis*) or the construction of a dock in Australia (*Hardeman—Monier—Hutcherson*. In all of the cases cited above, the Government knew about some non-obvious obstacle that anyone would encounter in trying to produce the contracted-for item. For example, in *Helene Curtis*, it was a new substance that needed grinding in order to mix properly into the disinfectant powder, and, in *Hardeman—Monier—Hutcherson*, it was severe weather conditions and water currents that made the dock much more difficult to construct.

The common thread is that, in all of these cases, the contractor had to spend more time or money on production than it anticipated when entering into the contract with the Government because of latent difficulties in the

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[7] In addition to the general reporting and registration requirements imposed by FIFRA, 7 U.S.C. § 135a, the act also requires manufacturers to test products prior to marketing them. Specifically, 7 C.F.R. § 162.106 (1949) requires that the manufacturer have the product thoroughly tested by experimenters, and if it is "likely to cause injury to human beings, or desirable plants or animals, its limitations from these standpoints should be determined and adequate cautions placed on the label."

manufacturing or construction process. Also, the Government, at the time of contract formation, had knowledge of the latent problems that would raise performance costs and did not divulge this knowledge to the contractors. Thus, citing to *Helene Curtis*, the United States Court of Claims in *American Ship Bldg. Co.*, 228 Ct. Cl. at 225, 654 F.2d at 79, stated that the four factors of the superior knowledge doctrine were:

> [W]here (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

To satisfy the requirements of the doctrine, the vital knowledge, which the Government possesses and the contractor does not, must be a fact that affects *performance costs or duration of performance*. In the case at hand, plaintiff does not claim that it had any unforseen problems in the manufacture of the Agent Orange which increased the costs of production or caused a delay in performance. Thus, the superior knowledge doctrine does not apply to plaintiff's claim and does not entitle it to recover costs that were not connected to actual *performance* under the contract, which was for the manufacture of the Agent Orange to the detailed Government specifications. *See generally, Lopez v. A.C. & S., Inc.* 858 F.2d 712, 717-18 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Prior case precedent simply does not allow the expansion of the doctrine of superior knowledge to be extended as far as the plaintiff apparently wants it to stretch. The time frame that the courts have found appropriate to review has always been the period of performance only—not some indefinite time stretching well into the future.

In its second and closely related theory, the plaintiff argues that, under basic contract principles, the Government had a duty to act in *good faith* and not increase the plaintiff's contract costs. *Petrofsky v. United States,* 222 Ct. Cl. 450, 616 F.2d 494 (1980), *cert. denied,* 450 U.S. 968 (1981); *Commerce Int'l Co. v. United States,* 167 Ct. Cl. 529, 338 F.2d 81 (1964). According to the plaintiff, the defendant breached this duty by failing to use Agent Orange in a safe manner and avoid potential health risks because the Government did not provide identification of the defoliant's active ingredients or give warnings concerning its proper use. Based on the Government's alleged failure to carry out these measures, plaintiff claims it is therefore entitled to reimbursement for the costs of the Agent Orange litigation as *increased costs of performance.*

The Government submits that there was no increase in the cost of performance since plaintiff fully performed the supply contracts at the agreed price. Also, the defendant avers there was no defect in the specification which could give rise to a claim of this type.

The Court finds that the Government has not breached its duty to act in good faith not to increase the cost of performance for basically the same reasons as discussed in the superior knowledge section above. This is another performance-related doctrine that will not be extended as a matter of law to assigning liability to a contracting party for matters that occur at some distant point in the future. The shoe simply does not fit. It is true that this Court has held that it is conceivable that third-party liabilities could be considered costs of performance at the time of entering the contracts. *Johns-Manville Corp. v. United States,* 13 Cl. Ct. 72, 161 (1987), *vacated on jurisdictional grounds,* 855 F.2d 1571 (Fed. Cir. 1988). However, we agree that:

> Judicial recognition has not been extended to the notion that a supply item produced according to speci-

> fications in a satisfactory manner, yet causing damages due to its use, can be the basis of a claim to recover damages as a cost of performance.

GAF Corp., 19 Cl. Ct. at 503. With this in mind, the Court will not further extend the outer limits of the plaintiff's good faith costs of performance implied-in-fact contract theory.

In its third theory, the plaintiff has likewise argued that the Government had a duty to exercise due care in *using* the plaintiff's product in order to avoid harming the plaintiff. According to the plaintiff, the Government breached this duty by mixing plaintiff's allegedly dioxin-free product with the dioxin-contaminated products of other manufacturers. Also, plaintiff avers that the Government again breached this duty by failing to provide adequate warning labels about the hazards of Agent Orange and forbidding the plaintiff to do so. Thus, plaintiff argues that, by mixing plaintiff's product with contaminated products and prohibiting warning labels, the Government subjected plaintiff to potential liability that did not exist previously.

As an aside, it is noted that the plaintiff continually refers to the Government as having various "duties" running to the plaintiff. It should also be noted in this connection that the Court has *contract* jurisdiction, and the concept of "duty" arises primarily in tort analysis. The Court, however, does not have jurisdiction over matters sounding in tort. 28 U.S.C. § 1491(a)(1) (1988). *Aetna Casualty and Sur. Co. v. United States*, 228 Ct. Cl. 146, 655 F.2d 1047 (1981). Although the plaintiff's arguments come perilously close to a jurisdictional block, the plaintiff's claims will be viewed as allegations of contractual obligations on the part of the Government to perform, or refrain from performing, in a certain way.

As the defendant has pointed out, the United States Court of Appeals for the Federal Circuit in *Lopez* rejected a claim similar to the plaintiff's, calling it "bizarre

and novel." As the court in *Lopez* has stated: "an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances." *Id.*, 858 F.2d at 716. Defendant deems this a reverse warranty claim, and this seems an accurate portrayal.

Looking to the guidance of the Federal Circuit in *Lopez*, it is clear that this reverse warranty theory must be considered to be a contract implied-in-fact, if it exists at all. To establish a contract implied-in-fact, there must be factual circumstances which indicate that the parties have actually come to a meeting of the minds and taken upon themselves corresponding obligations and liabilities. *Hirschmann v. United States*, 11 Cl. Ct. 338, 342 (1986). Such a factual inference is not supported by any of the circumstances surrounding the sale of the Agent Orange by plaintiff to the Government.

While plaintiff may believe it is fairer to allocate the liability to the user of the product, this type of reverse warranty, based on fairness of risk allocation, is cognizable only as a quasi-contract implied-at-law, *Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1219 (9th Cir. 1974). This Court is without jurisdiction to consider implied-in-law contracts. *United States v. Mitchell*, 463 U.S. 206, 218 (1983); *Lopez*, 858 F.2d at 714-15; *Hirschmann*, 11 Cl. Ct. at 342.

2. The plaintiff's warranty of specification claim.

In *United States v. Spearin*, 248 U.S. 132, 136-37 (1918), the Supreme Court held that the inclusion of detailed specifications in a contract prepared by the Government imported a warranty that, if the specifications were followed, the resulting product would be adequate, and the contractor would not be responsible for the consequences of defects in the specifications. This implied

warranty of specification has been recognized in many cases since *Spearin*. *See e.g., Ordnance Research, Inc. v. United States,* 221 Ct. Cl. 641, 609 F.2d 462 (1979); *Hol-Gar Mfg. Corp. v. United States,* 175 Ct. Cl. 518, 360 F.2d 634 (1966); *Blount Bros. Corp. v. United States,* 872 F.2d 1003 (Fed. Cir. 1989).

In *Spearin,* the defect became apparent due to damage that occurred during the performance of the contract. *Spearin,* 248 U.S. at 134-35. However, the warranty of specification is not limited to the time of performance, according to the holding in *Poorvu v. United States,* 190 Ct. Cl. 640, 420 F.2d 993 (1970). In that case, the defect in the specified construction method did not begin to manifest itself until some four years after the completion of the building, and the United States Court of Claims determined that the *Spearin* warranty of specification still operated to place the liability for the damage on the Government, which had dictated the construction specifications. *Poorvu,* 190 Ct. Cl. at 651, 420 F.2d at 1000.

Plaintiff argues that an implied-in-fact warranty of specification arose in this case because the Government supplied detailed specifications for Agent Orange to Hercules, and the plaintiff manufactured the defoliant in accordance with these detailed specifications. The warranty of specification means that the Government impliedly warranted that the item made to the precise specification would be safe and free from defects. Plaintiff claims that the Government breached this warranty because the plaintiff was subjected to tort suits by third parties who claimed they were injured by the Agent Orange the plaintiff manufactured.

The Government contends that plaintiff's claim is nearly identical to claims made by the asbestos manufacturers that, based on contract theories, attempted to recover from the United States costs they incurred as a result of suits brought by shipyard workers who were

exposed to asbestos dust from using insulating products. The asbestos manufacturers made these products in accordance with military specifications and sold them to the United States during the World War II era and thereafter. Accordingly, the defendant relies on two asbestos-related cases, *Lopez* and *GAF Corp.*, for its defensive position. The Government contends that these cases bar the plaintiff's warranty of specification claim on the grounds that the factual circumstances of this case do not support finding an implied-in-fact agreement, a meeting of the minds, and this Court lacks jurisdiction over contracts that are implied at law. *Lopez*, 858 F.2d at 714-15; *GAF Corp.*, 932 F.2d at 950.

For a warranty to be implied in fact, the plaintiff must demonstrate that "the circumstances strongly supported a factual inference that a warranty was implied." *Lopez*, 858 F.2d at 715. Such an inference arises only when the Government specifications told the contractor "just how to do the job", *Id.* at 716, and not when they merely specified some certain characteristic in the contracted-for product. *GAF Corp.*, 932 F.2d at 950. With respect to the claims of breach of warranty of specification, the Court agrees with the plaintiff that the underlying bases of the decisions in *Lopez* and *GAF Corp.* were that the asbestos companies knew about the dangers of their products before entering into the contracts with the Government and that the products manufactured under the Government contracts did not differ materially from those already sold commercially. Thus, there was no basis for finding a factual inference that the specifications constituted an "extensive Government intrusion into the asbestos production process which might suggest that the Government intended to warrant the product's safety." *GAF Corp.*, 932 F.2d at 950.

Plaintiff argues that, in this case, there exists the extensive Government intrusion into the Agent Orange production process that suggests that the Government intended to warrant the product's safety. Also, the plain-

tiff alleges that it is unlike the asbestos manufacturers because it knew less than the Government did about the defoliant, and Agent Orange differed materially from the products plaintiff sold commercially.

However, even assuming that a warranty of specification arose from the Government's detailed specifications for Agent Orange, there must be more than the mere existence of a warranty to entitle the plaintiff to recover against the Government. Plaintiff must also show that this warranty was *breached* by the Government and that this breach caused plaintiff to suffer the type of damages recoverable in contract. It is on these requirements, breach and contract damages, that the plaintiff has failed to state a case that can withstand the Government's summary judgment motion.

Turning again to *Spearin* and its progeny, the implied warranty of specification was breached when the product, made in accordance with the detailed specification created by the Government, was inadequate, and the inadequacy clearly caused some damage. In *Spearin*, the sewer was inadequate due to a problem with a blocked sewer pipe in the existing system; the new pipe broke, and the sewer overflowed and damaged the dry dock that the contractor was building for the Government. *Id.*, 248 U.S. at 134. In *Poorvu*, the parking area for a building was constructed with inadequate support below it, in accordance with the Government's specifications. This caused the parking area to settle and put pressure on water pipes that were located beneath it. These pipes broke, and the water spilling from them saturated the ground under the building, which then weakened the support under the building, causing it to settle severely into the ground. *Id.*, 190 Ct. Cl. at 646-47, 420 F.2d at 997.

In these cases, it is clear that the specification was inadequate, and the resulting defect in the finished product caused obvious and direct damage. The courts in these cases appeared to analyze these situations by de-

termining first, whether or not some damage had occurred, and second, whether or not the specification written by the Government was defective. If these two circumstances were present, the courts then determined which party should bear the risk of the faulty specification causing the damage. The implied warranty of specification is the method by which the court can allocate the risk of the faulty specification to the Government, which created the specification, rather than to the contractor, who actually built the defective item that caused the damage. *See* JOHN C. CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 199-202 (2d ed. 1985). As stated in *Spearin*, 248 U.S. at 136, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." Also, the court held in *Poorvu* that "the government must answer for damage incurred because of inadequate plans it has furnished." *Id.*, 190 Ct. Cl. at 651, 420 F.2d at 1000.

In this case, plaintiff asserts that the Government designed faulty specifications for Agent Orange because dioxin contaminated the specified defoliant product. The damage plaintiff claims as a result of the faulty specification is, however, the settlement costs it incurred when veterans claimed they were injured by the dioxin in the Agent Orange used for military purposes in Vietnam. Thus, the plaintiff claims that the Government breached the warranty by subjecting the chemical manufacturer to tort liability running to third parties who were injured by the Government's use of the Agent Orange manufactured by the plaintiff. However, for several reasons, the plaintiff cannot prove that it was actually subjected to tort liability by third parties because of its manufacture of Agent Orange for the Government's military use. First, dioxin has never been scientifically proven to cause the injuries that the veterans alleged, and second, the plaintiff was protected from liability to the veterans in

any event under the Government contractor defense, which is discussed later in this opinion. Thus, to the extent that the warranty of specification does exist in this case, there has been no breach of the implied warranty of specification because the alleged defect in the herbicide has never been proven, and the plaintiff would not have been liable to third parties even if the specifications had been defective due to the Government contractor defense.

It is clear to this Court, after reviewing the many and varied decisions regarding the veterans' suits against the herbicide manufacturers, that Agent Orange and dioxin have never been proven to cause the injuries claimed by the veterans. As stated in the *Settlement Opinion*, "the result of an enormous scientific effort to be helpful on causation has, from the plaintiffs' point of view, left the case at best open. This is not sufficient to support a recovery in tort law * * *." *Id.*, 597 F.Supp. at 795. Likewise, when the claims of the veterans who opted out of the class went forward after the settlement of the class action, the United States District Court for the Eastern District of New York granted summary judgment to the chemical manufacturers (including Hercules) and noted that "years of discovery and tens of millions of dollars spent by the government and others on research has not yielded any competent evidence indicating a genuine issue of fact about causation." *Opt-Out Opinion*, 611 F.Supp. at 1260. Thus, plaintiff cannot show that it has been held liable to a third party for damages caused by a defect in the herbicide it produced for the Government under detailed specifications.

As for damages arising from contract breaches, it is axiomatic that such damages are limited to those that were reasonably foreseeable at the time the parties formed the contract. *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In *Northern Helex Co. v. United States*, 207 Ct. Cl. 862, 888, 524 F.2d 707, 721 (1975), *cert. denied*, 429 U.S. 866 (1976), the court reviewed the rules governing damages for breach of contract and

concluded that the authorities support denial of claims where "costs are too remote, speculative, and consequential to be compensable as damages." In this case, it is apparent that the costs (damages) plaintiff incurred by defending and settling a lawsuit brought by veterans, who were never able to prove that the plaintiff's product injured them, were not reasonably foreseeable at the time the contract was formed between the Government and the plaintiff.

Plaintiff urges that there is a strong judicial policy favoring settlements and the fact that it settled the underlying case, rather than litigating the issue of its liability to the veterans, should not count against plaintiff in its attempt to recover from the Government for breach of warranty. It is true that settlements are encouraged. *See e.g., Ahern v. Central Pac. Freight Lines,* 846 F.2d 47, 48 (9th Cir. 1988); *Janneh v. GAF Corp.,* 887 F.2d 432, 435 (2d Cir. 1989). However, the cases plaintiff cites regarding the recovery of settlements paid to third parties involve indemnification agreements, either implied-in-fact or implied at law. *Travelers Ins. Co. v. United States,* 493 F.2d 881 (3d Cir. 1974); *Parfait v. Jahncke Serv., Inc.,* 484 F.2d 296 (5th Cir. 1973), *cert. denied,* 415 U.S. 957 (1974). As noted earlier, this Court does not have jurisdiction over contracts implied at law. *United States v. Mitchell,* 463 U.S. at 218. As for an implied-in-fact contract, the factual circumstances do not support one because it simply was not foreseeable to the parties that the Agent Orange class action settlement would come to pass more than a decade after the contracts to supply the defoliant were formed. The facts may support an implied warranty of specifications, but they cannot be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an indemnification agreement between them if the implied warranty of specification was alleged, but never proven, to be violated.

As for plaintiff's claim of attorney fees, the court in *Kania v. United States*, 227 Ct. Cl. 458, 467, 650 F.2d 264, 269, *cert. denied*, 454 U.S. 895 (1981), noted that "jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases." *Also see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Overall, "[c]ourts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made." *Kania*, 227 Ct. Cl. at 467, 650 F.2d at 269. Thus, plaintiff cannot support a contention that it suffered compensable damages to the amount of its legal fees and costs as a result of the Government's alleged breach of the implied warranty of specification.

Finally, the question remains as to whether plaintiff could ever have been found liable to third parties, even if causation between Agent Orange and veterans' injuries had been proven. The Government contractor defense would certainly present a serious obstacle to a manufacturer's liability to military service personnel for defects in products made to Government specifications for military applications. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); and *Feres v. United States*, 340 U.S. 135 (1950). The Government contractor defense will be discussed more fully in a later section of this opinion, but its impact on any liability the plaintiff would have to third parties must be noted at this juncture. The plaintiff asserts, in its arguments involving superior knowledge, that it manufactured the product to detailed specifications and lacked the knowledge it alleges the Government had regarding the hazards of Agent Orange. If this is true, then the plaintiff would avoid liability to third parties based on the Government contractor defense. *Boyle*, 487 U.S. at 512. The plaintiff had

an absolute defense. Plaintiff was well aware of this strong defense before it agreed to settle the claims of the veterans because, in 1983, it was granted summary judgment in its favor on the basis of the Government contractor defense, *Agent Orange,* 565 F.Supp. at 1275, even though plaintiff was later brought back into the case. Thus, in addition to the reasons already discussed above, there was no breach of the warranty of specification based on the manufacturer's tort liability to third parties supposedly injured by the product because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense.

After consideration of all of the plaintiff's contractual arguments, it is apparent that most of the theories plaintiff advanced do not apply to hold the Government liable for the amount paid in connection with the settlement of the class action suit. The warranty of specification might apply to the Government based on the detailed specification for the production of Agent Orange. However, plaintiff has failed to come forth with the required quantum of proof regarding the breach of this warranty and the contract damages flowing therefrom. Thus, the moving party is entitled to summary judgment because the nonmoving party, the plaintiff, has "failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex v. Catrett,* 477 U.S. at 323.

B. *The Government Contractor Defense*

Even if this Court is in error when it finds no breach and no damages as a matter of law in this case, the plaintiff would still not be able to recover in this action because of the Government contractor defense and the law in regard to contract indemnification. Defendant alleges that, regardless of the resolution of the contractual issues in this matter, the Government contractor defense provides a *separate* and *independent* basis for a denial of

plaintiff's claims. Based on the policies underlying the Government contractor defense, the defendant states that the plaintiff cannot be allowed to recover indirectly through this contract suit for reimbursement what the veterans could not recover directly against the Government under the Federal Tort Claims Act, 28 U.S.C. § 2671-80 (1988) (FTCA), i.e., tort damages from the Government payable to military personnel for injuries allegedly sustained while serving on active duty.

Plaintiff counters that the Government contractor defense was not settled law at the time of the settlement with the veterans in the class action suit, so there was the possibility that it might have been held liable to the veterans for billions of dollars. Thus, their decision to settle was very reasonable in the face of the possibility of massive liability. Also, plaintiff argues that the Government, in a brief it filed, argued against the application of the Government contractor defense to shield the herbicide manufacturers from liability, and thus it is estopped from urging its application here.

While the Government contractor defense is certainly important to the resolution of the issues in this case, both parties have neglected to consider crucial matters in support of their respective arguments. What is primarily at issue in this case is the *Government's liability* to the plaintiff under these circumstances, not just the plaintiff's liability to the veterans. Fortunately, this issue has already been considered by the Supreme Court in *Stencel*, and this Court will follow its clear guidance in the instant case.

In *Stencel*, a serviceman, who was injured when the ejection system of his fighter aircraft malfunctioned, brought a product liability damage action against the manufacturer, Stencel, and the United States. Stencel cross-claimed against the Government for indemnity claiming that any malfunction in the system was due to faulty Government specifications and components. Based on the earlier *Feres*

case, the Supreme Court upheld the district court's grant of summary judgment for both the Government and Stencel against the serviceman and also upheld the dismissal of Stencel's cross-claim against the Government.

In the *Feres* case, the Supreme Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the FTCA. *Id.*, 340 U.S. at 146. The Supreme Court in *Stencel* reviewed the *Feres* decision and concluded that it rested on three factors. First, the Supreme Court found that the relationship between the Government and its military personnel is distinctively federal in character, and, thus, it would not make sense to have the liability of the Government to an injured serviceman depend on the law of the place where the injury occurred. Second, the Supreme Court determined that the statutory compensation scheme, which provides pensions and medical services to injured servicemen without regard to any negligence by the Government, stands as a legal substitute for allowing the Government to be sued in tort for negligence. Third and finally, the Supreme Court concluded that military discipline and the relationship between a soldier and his superiors, which has no counterpart in civilian affairs, might be distorted by the imposition of tort liability. *Stencel,* 431 U.S. at 671-72.

In the case of the contractor suing the Government, the Supreme Court determined that the same factors were relevant and that it must "consider the impact of these factors where, as here, the suit against the Government is not brought by the serviceman himself, but by a third party seeking indemnity for any damages it may be required to pay the serviceman." *Id.*, 431 U.S. at 672. The first factor, the application of federal rather than state law, and the third factor, the effect of tort liability on military discipline, operated with equal force in suits by the serviceman and suits by the contractor. *Id.*, 431 U.S. at 672-73. The second factor, the existence of the military

compensation scheme, the Supreme Court found more difficult to apply in the case of the contractor suing to recover funds it had paid the serviceman. However, it concluded that the compensation scheme served the dual purpose of providing an efficient remedy for the injured serviceman and also protected the Government through its limitation of liability provisions which provide an upper limit on the Government's liability for service-connected injuries. *Id.*, 431 U.S. at 673. Thus, in *Stencel*, 431 U.S. at 673, the Supreme Court determined that:

> To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." [Citations omitted, alterations and omissions in original.]

Therefore, the contractor was not allowed to recover from the Government where the underlying claim for which the contractor was seeking indemnity was made by an injured serviceman. In conclusion, the Court observed that "[s]ince the relationship between the United States and [the contractor] is based on a commercial contract, there is no basis for a claim of unfairness in this result." *Id.*, 431 U.S. at 674.

The situation analyzed in *Stencel*, a contractor seeking indemnity from the United States for claims made by an injured serviceman, is analogous to plaintiff's claim in this case. Plaintiff in this action is seeking repayment from the Government of amounts it paid to injured military service personnel based on the Government's provision of specifications for the product which allegedly harmed the military service personnel. While in its later briefs plaintiff has shied away from its request for con-

tractual indemnification, perhaps to avoid the application of the *Stencel* case, it is clear that indemnity is what plaintiff seeks regardless of the title plaintiff applies to it. BLACK'S LAW DICTIONARY 769 (6th ed. 1990) defines indemnity as "reimbursement." Reimbursement of the amounts it paid in settlement and legal fees is what plaintiff requests here, and, thus, the strictures of the *Stencel* case apply and foreclose plaintiff's claim that the Government must reimburse it for its costs and fees in connection with the Agent Orange litigation. This suit by the plaintiff is a "back door" attempt to recover from the Government what the *Feres* doctrine blocked at the front door; that is, damages for injuries suffered by servicepersons in the line of duty. Accordingly, the rationale of *Stencel* requires this Court to deny the plaintiff's claim.

The reasoning of *Feres* and *Stencel* was later amplified and extended by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which involved an action between private parties but implicated the Federal Government's interests. In *Boyle*, a United States Marine co-pilot was killed when his helicopter crashed into the water during a training exercise. Although the Marine survived the impact, he was unable to escape from the submerged helicopter and drowned. Based on state tort law, the Marine co-pilot's estate sued the Government contractor that built the helicopter, claiming that the escape hatch was designed negligently because it opened outwards and was unusable when the helicopter was under water, due to the pressure of the water outside the submerged craft. The Government contractor (United Technologies) contended that it made the escape hatch to the precise specifications required by its contract with the Government and therefore was not liable under state tort law.

Even though it was a state law tort suit between private parties, the Supreme Court found that "the Federal Government's interest in the procurement of equipment

is implicated by suits such as the present one—even though the dispute is one between private parties." *Id.*, 487 U.S. at 506. Thus, federal law could possibly apply. However, for federal law to displace state tort law, there must be a significant conflict between a federal policy and the operation of the state tort law. *Id.*, 487 U.S. at 507. Looking at the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1988) (FTCA), the Supreme Court identified a provision that suggested the outlines of a significant conflict between federal interests and state tort law in the area of Government procurement. While the FTCA authorized suits against the Government for harm caused by the negligent or wrongful conduct of Government employees in certain circumstances, it specifically excepted from consent to suit any claims based on the exercise of a discretionary function by a federal agency or employee, 28 U.S.C. § 2680(a) (1988). *Boyle*, 487 U.S. at 511. The Court determined that:

> [T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. If often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments * * * through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. [Citations omitted.]

Id. Thus, the state law, which would hold the Government contractor liable for design defects in military equipment, is displaced by the federal policy and law of deferring to military discretion in the procurement of military equipment embodied in the FTCA.

The Supreme Court in *Boyle* adopted a three-part test to determine when, to avoid conflict with the discretionary

function exception, displacement of state law is appropriate. It stated:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id., 487 U.S. at 512. If the contractor satisfies this test, then it is not subject to tort liability under state law for defects in equipment it manufactured for the military in conformance with precise specifications provided by the Government. This is because such liability would infringe on the discretionary function exception to the FTCA by allowing a state court to second-guess indirectly the Government's judgment in the selection of the appropriate design for military equipment.

The defendant argues here that the plaintiff's Tucker Act claim for contractual damages, just like a state court tort suit, is an attempt to have the judiciary second-guess the Government's decision to procure and employ Agent Orange. The defendant claims that this flies in the face of the Government contractor defense and the discretionary function exception and that it does violence to the policy of Government discretion in military procurement which these doctrines protect. Thus, based on the policies underlying the Government contractor defense, the defendant contends that the plaintiff is barred from recovery on its Tucker Act claim.

The Government contractor defense is important to the instant case for two reasons. First, its underlying policies, as expressed in *Boyle*, are to protect the discretion of the Government in procuring military equipment, as mandated by the discretionary function exception to the FTCA. Therefore, this Court must determine whether

these policies apply equally to suits by contractors against the Government as they do to suits by injured military personnel against the contractor, which *Boyle* addressed specifically. Second, this Court must consider whether the Government contractor defense operated in the suits plaintiff faced and provided plaintiff with such a strong defense that it is without grounds to claim that it was actually in grave danger of being held liable to third parties in tort for injuries stemming from the product it produced for the Government.

This Court agrees with the defendant's argument that the policies supporting the *Boyle* decision apply with equal force to an attempt by a Government contractor to sue the Government directly. The Supreme Court in *Boyle* was concerned with preserving the discretion of the military in choosing the appropriate design for military equipment because this choice involves balancing many conflicting considerations, including the trade-off between safety and combat effectiveness. *Id.*, 487 U.S. at 511. The exact same discretion and balancing by the Government is implicated in the case at issue. The Government procured Agent Orange to serve military needs in Vietnam. The product was designed and used to save American soldiers' lives by eliminating possible hiding places for the Viet Cong and North Vietnamese troops. Trade-offs between the effectiveness of Agent Orange and its safety were a necessary part of the Government's procurement and design activities. This Court agrees with Chief Judge Weinstein, who found that "[t]he information available makes it clear that the government would have concluded that the beneficial saving of American soldiers' lives by defoliating the Vietnamese jungles far outweighed any minimal risks to our own or allied troops posed by exposure to Agent Orange." *Opt-Out Opinion*, 611 F. Supp. at 1263-64. As another court has noted, "[i]t is this sort of balancing which the *Boyle* defense protects, by providing for contractor immunity where state tort law would hold the contractors liable for

injuries resulting from the government's design deficiencies." *In re Aircraft Crash Litig.*, 752 F. Supp. 1326, 1370 (S.D. Ohio 1990), *aff'd without op.*, 935 F.2d 269 (6th Cir. 1991). Thus, this Court will heed the warning in *Boyle*, 487 U.S. at 511, and not second-guess military procurement decisions made by the Government in the guise of allowing the plaintiff contractor to recover from the Government payments made to injured service persons. Also, this Court will not restructure the United States' immunity and consent to tort suits, which is specified by the FTCA and its exception for discretionary functions, through the vehicle of a contract claim based on tort damages, especially in light of the expansion of immunity clearly manifested in *Boyle*. *Lopez*, 858 F.2d at 718.

Plaintiff submits that *Boyle* was several years subsequent to the settlement in this case in 1984, and that, in 1984, the application of the Government contractor defense was at best, uncertain. In effect, plaintiff argues that *Boyle* created a new doctrine and that it should not be applied retroactively. This raises the second reason for consideration of the Government contractor defense; namely, its availability to the plaintiff as a defense in the state tort suits it faced. The defendant contends that the plaintiff would never have been required to pay the veterans for their alleged injuries because, as a Government contractor, the plaintiff was completely protected by the Government contractor defense. The Government notes that plaintiff was, in fact, granted summary judgment earlier against the opt-out claimants in view of the Government contractor defense in the district court, *Opt-Out Opinion*, 611 F. Supp. at 1263-64. Also, the United States Court of Appeals for the Second Circuit affirmed on this basis, because "[s]ubjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond its constitutional authority and constitutional competence." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 191.

Plaintiff argues that it is unfair to retroactively apply *Boyle,* which was decided in 1988, to the issues plaintiff faced at the time of the settlement in 1984. However, this Court is not applying *Boyle* retroactively. The Government contractor defense existed long before *Boyle. See Yearsley v. W.A. Ross Constr. Co.,* 309 U.S. 18 (1940). Instead, using *Boyle* as a guide, this Court is applying the holdings of *Feres* (1950) and *Stencel* (1977), as discussed earlier, and the discretionary function exception to the FTCA, to the issues presented in this case. *Feres, Stencel,* and the FTCA were all operative at the time of the settlement in 1984 and would have barred a military contractor's tort liability to injured military service personnel. In fact, the defense was fully discussed by Judge Pratt in his 1983 decision, which granted the plaintiff's motion for summary judgment and allowed the plaintiff to be removed from the *Settlement* case based on the operation of the Government contractor defense. *Agent Orange,* 565 F. Supp. at 1265. Thus, the later decision in *Boyle* did not chart a new course for Government contractors. It merely enunciated and clarified the Government contractor defense which already existed.

As a final note, plaintiff also argues that the Government has taken inconsistent positions, by opposing the Government contractor defense in the district court and supporting it in this case. Plaintiff claims that the Government should be be estopped from asserting a different position in this case than it took in the earlier case in which it filed the brief. However, plaintiff has not argued this point fully, and it should suffice to note that under *Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990), it is unlikely that estoppel will be found against the Government without a showing of fraud or affirmative misconduct by the Government. *Heckler v. Community Health Serv.,* 467 U.S. 51, 67 (1984); *Schweiker v. Hansen,* 450 U.S. 785, 788-89 (1981); *Jana, Inc. v. United States,* 936 F.2d 1265, 1270 (Fed.

Cir. 1991), *cert. denied,* 116 L. Ed. 2d 775 (1992); *Bolt v. United States,* 944 F.2d 603, 609 (9th Cir. 1991); *Portmann v. United States,* 674 F.2d 1155, 1164 (7th Cir. 1982); *People's Bank & Trust Co. v. United States,* 7 Cl. Ct. 665, 668-69 (1985). No such fraud or affirmative misconduct has been shown or even alleged here, and, thus, this Court finds no grounds for estoppel.

C. *Contract Indemnification*

Plaintiff asserts in all four of its contractual claims that it is entitled to "contractual indemnification." The exact bases for these claims are unclear, and it appears that these claims are actually allegations made for the purpose of proving damages due to the breach of the warranty of specification which have already been addressed. Nevertheless, plaintiff's indemnification claims will be resolved separately.

For contractual indemnification to exist and to be actionable in this Court, it must arise from an express or implied-in-fact contract term involved here. There is, of course, no express contract indemnification term. However, even if this Court were to assume, which it does not, that such an implied-in-fact contract term arose from the dealings between the parties, the term itself could not operate to bind the Government. It is clear that the United States cannot be bound by a contract, or a term within a contract, into which its agents were without the legal authority to enter. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947). This principal applies regardless of whether or not the contract is express or implied. *Sutton v. United States,* 256 U.S. 575, 580 (1921). However, the plaintiff cannot show that the agent of the Government had the authority to enter a binding indemnification agreement because, for indemnity to exist, there must be either a prior appropriation to cover the possible costs of indemnity and/or a statutory exception to this rule permitting such payments. *See Matter of: Assumption by Government of Contractor Liability to Third Per-*

sons—Reconsideration, 62 Comp. Gen. 361 (1983). This is because an unfunded or unexcepted indemnification term would violate the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988), which bars a federal agency from entering into a contract for future payments in excess of an existing appropriation. The Act states, in pertinent part, that officers or employees of the United States may not:

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341 (1988).

Thus, in *California-Pacific Util. Co. v. United States,* 194 Ct. Cl. 703 (1971), the Court of Claims dismissed an indemnification claim brought by a utility company seeking to recover amounts paid in settlement to a federal employee injured by one of its electric poles. The Court stated that:

> The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Anti-Deficiency Act] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated.

Id., 194 Ct. Cl. at 715.

In the present case, plaintiff presents no appropriation or statutory exemption which would authorize indemnification in this case. Thus, even if an implied indemnification agreement existed, it would be unenforceable under the Anti-Deficiency Act. Therefore, the plaintiff has no grounds for recovery on any contractual indemnification theory.

In final summary, the plaintiff has failed to convince this Court that it can recover on any one of its four implied-in-fact contract theories. Further, even if any one of its four contract theories could be found to be factually supportable, the plaintiff would still lose this lawsuit because of the application of the Government contractor defense to the undisputed facts and/or the application of the Anti-Deficiency Act bar to any recovery in indemnification by contract.

CONCLUSION

For the reasons stated above, the defendant's motion for summary judgment is granted, and the complaint is to be dismissed.

Costs to the prevailing party.

IN THE UNITED STATES CLAIMS COURT

No. 90-496 C

HERCULES INCORPORATED

v.

THE UNITED STATES

JUDGMENT

Filed Apr. 2, 1992

Pursuant to the opinion of April 2, 1992,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Costs to the prevailing party.

DAVID A. LAMPEN
Clerk of Court

April 2, 1992

By: /s/ Linda A. Elgin
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

IN THE UNITED STATES CLAIMS COURT

No. 90-391C

(Filed: Apr. 22, 1992)

WM. T. THOMPSON COMPANY,
a Missouri Corporation

v.

THE UNITED STATES

Contracts; Agent Orange; implied-in-fact contract terms; Government contractor defense; indemnification; Defense Production Act of 1950, 50 U.S.C. app. §§ 2061, 2157 (1988).

OPINION

Yock, *Judge.*

This contractual dispute is before the Court on the parties' cross-motions for summary judgment, filed pursuant to USCC Rule 56.[1] For the reasons stated herein, the defendant's motion for summary judgment is granted, and the plaintiff's complaint will be dismissed.

Facts

Plaintiff, Wm. T. Thompson Company (Thompson), was a manufacturer in the mid to late 1960's of a prod-

[1] Defendant has, in the alternative, moved to dismiss pursuant to USCC Rule 12.

uct known as Agent Orange, which was used for military purposes by the United States Government as a defoliant during the Vietnam War. Years later, Vietnam veterans and their families, alleging that exposure to Agent Orange caused death, injuries, and birth defects, sued all the Agent Orange manufacturers, including Thompson. This multi-district product liability tort suit was settled before trial, *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter "*Settlement Opinion*"), 597 F. Supp. 740 (E.D. N.Y. 1984), *aff'd,* 818 F.2d 145 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988), and Thompson was required to pay $3,096,597.22 of the total settlement amount. The instant contract suit was brought by Thompson in an attempt to recover from the United States Government the costs it incurred in defending and settling the suit in the district court.

The following facts are essentially uncontroverted: Agent Orange is a mixture of two phenoxy herbicides, 2,4-Dichlorophenoxyacetic Acid (2,4-D), and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T) in a 50/50 blend. Depending on the process utilized, when 2,4,5-T is produced, it may contain varying amounts of 2,3,7,8 Tetrachlorodibenzo-p-dioxin (dioxin), a toxic substance, although not a key ingredient of either Agent Orange or 2,4,5-T.[2]

As one court noted, "the government and the military had a considerable amount of knowledge about 2,4,5-T, about dioxin, and about the hazards associated with both." *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter "*Agent Orange*"), 565 F. Supp. 1263, 1266 (E.D. N.Y. 1983). This knowledge extended back into the 1950's, and the level of knowledge increased rapidly during the mid to late 1960's. Much of the Government's knowledge was classified and not shared with the chemical com-

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[2] **While it has not been proven scientifically or legally, the Vietnam veterans believed that exposure to Agent Orange caused cancer and birth defects, and these were allegedly caused by the dioxin present in this defoliant.**

panies. *Id.* at 1267-68. However, some of the bigger chemical companies that were producing Agent Orange for the military did develop a considerable amount of knowledge about the dangers associated with the production of 2,4,5-T and the dioxin contained therein during this same time frame.

Thompson began producing phenoxy herbicides that contained 2,4,5-T by itself, or in a mixture with 2,4-D, in the early 1950's and continued to market these herbicides in the early 1960's. In 1961, the Government began to use a variety of phenoxy herbicides in Southeast Asia to defoliate trees and plant life to eliminate possible hiding places for the Viet Cong and the North Vietnamese troops.[3]

As the Vietnam War progressed, the military needed greater amounts of Agent Orange, but Thompson declined to bid for the contracts. As summarized by another court, the Government was not deterred, and:

> Acting under appropriate statutory authority, The Defense Production Act of 1950, Sept. 8, 1950, ch. 932, 64 Stat. 798, amended, June 30, 1966, 80 Stat. 235 (current version at 50 U.S.C. App. §§ 2061 *et seq.*) however, the government required Thompson to supply Agent Orange pursuant to two contracts dated April 19, 1967 and May 24, 1968. It supplied 333,685 gallons between September 1967 and January 1969. As reflected in test results, the dioxin content of its product ranged from .1 to .3 [parts per million].

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[3] **The defoliant Agent Orange and Thompson's commercial herbicides were of different concentrations and were applied differently. Agent Orange contained roughly two or four times as much 2,4,5,-T per gallon as most of the Thompson herbicides. Also, the Government used Agent Orange undiluted and sprayed at a rate of 3 gallons per acre, as compared to the dilution of Thompson's herbicide at a ratio of 100 to 1, sprayed at a rate of 1 gallon per acre.**

Agent Orange, 565 F. Supp. at 1272. The two contracts specified the formula for producing Agent Orange, and Thompson provided no input to the Government with respect to either the development or modification of the specifications, and the company strictly complied with the specifications. Regarding the possible hazards to users of Agent Orange, it appears that "the government's level of knowledge greatly exceeded that of Thompson in 1967." *Id.* at 1273. In March of 1967, the Government ordered Thompson to accelerate production of Agent Orange, and Thompson complied.[4] Thompson's total production was approximately two percent of all of the Agent Orange manufactured for use in Vietnam.

Some years later, starting in 1979, Vietnam veterans, or their estates, began filing negligence and strict liability tort actions against the chemical companies that produced Agent Orange for the Government. According to these plaintiffs, in view of the toxicity of dioxin, exposure to the Agent Orange that contained dioxin caused cancer, miscarriages, and birth defects. These actions were consolidated in the Eastern District of New York under the heading MDL No. 381.

On May 20, 1983, Thompson was granted summary judgment on its Government contractor defense, based upon the district court's finding that there was no evidence that Thompson had knowledge of hazards to users of Agent Orange and that the "government's level of knowledge greatly exceeded that of Thompson in 1967." *Agent Orange*, 565 F. Supp. at 1273. Unfortunately for Thompson, the granting of summary judgment was reversed by the succeeding district court judge approximately five months later, and Thompson was again made part of the litigation, along with all the other manufacturers of Agent Orange.

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[4] Plaintiff alleges that the Government's method for accelerating production, increasing the temperature during processing, caused an increase in the amount of dioxin contamination.

On May 7, 1984, the date trial was to begin, the parties reached a settlement, and a $180 million settlement fund was created. *Settlement Opinion*, 597 F. Supp. at 748. The district court judge weighing the potential costs as well as the uncertainties associated with trial for both sides, found that the proposed settlement was fair, reasonable, and adequate. However, he did note that plaintiffs *had never* produced any persuasive evidence showing a causal relationship between the exposure to small quantities of dioxin found in Agent Orange and the claimed injuries. *Id.*, 597 F. Supp. at 782-95. The district court's settlement opinion was affirmed, and the appeals court noted that it was "essentially a settlement at nuisance value," based on the "grave weaknesses in plaintiffs' case," since "the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 171, 174 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Thompson's share of the settlement was $3,096,597.22, which it paid into the settlement fund in June, 1984. According to Thompson, it also spent approximately $3 million in legal fees during the Agent Orange litigation.

Nearly 300 plaintiffs had previously opted out of the class action suit and thus were not bound by the May, 1984 settlement. Thompson and other Agent Orange manufacturers successfully moved for summary judgment against these remaining plaintiffs. *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter *"Opt-out Opinion"*), 611 F. Supp. 1223 (E.D. N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The district court judge found that (1) plaintiffs failed to present credible evidence as to causation, and that (2) the plaintiffs' claims were barred by the Government contractor defense.[5] *Id.*, 611 F. Supp. at 1229, 1258-63.

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[5] The court also found that no individual plaintiff could prove which defendant chemical company had manufactured the Agent Orange to which he allegedly had been exposed.

The appeals court affirmed, based upon the Government contractor defense, and also agreed that "the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 190 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

The plaintiff filed its complaint with this Court on May 7, 1990 and amended it on October 23, 1990. According to Thompson, the Government breached its duty to disclose its superior knowledge regarding the health risks of Agent Orange. Additionally, Thompson submits that the Government violated its implied warranty that the Agent Orange it required Thompson to manufacture based on detailed specifications would be safe and free from defects. Finally, Thompson alleges that the Government breached an implied contractual duty to indemnify Thompson for losses arising from the Government's requirement that Thompson produce Agent Orange.[6] The Government filed a Motion To Dismiss or, in the Alternative, for Summary Judgment on November 20, 1990, seeking dismissal of the suit as a matter of law. Thompson filed a Cross-Motion for Summary Judgment on February 19, 1991, on the grounds that the law and the uncontested material facts dictate a finding that the United States Government is liable to Thompson.

Discussion

"Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *GAF Corp. v. United States*, 19 Cl. Ct. 490, 496 (1990), *aff'd*, 932 F.2d 947 (Fed. Cir. 1991), *cert. denied*, 117 L. Ed. 2d 131 (1992). The substantive law involved

[6] **While plaintiff's amended complaint included a constitutional taking claim, the defendant is correct in noting that, since plaintiff has made no further mention of this claim, it must be considered abandoned. Thus, it will be dismissed.**

in the suit determines which facts are material, and only disputes over material facts, those which might affect the outcome of the suit under the governing law, may properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over facts that are not relevant under the controlling law will not prevent the entry of summary judgment. *Id.* The moving party, in this case the defendant, has the burden of establishing that there are no genuine issues of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986), and that it is entitled to judgment as a matter of law. *GAF Corp.*, 19 Cl. Ct. at 496. For the following reasons, this Court finds that the Government has met its burden of establishing that there are no genuine material issues of fact in dispute and that it is entitled to judgment as a matter of law.

In its complaint, the plaintiff has alleged that it is entitled to reimbursement from the Government under three counts. All three counts are based on alleged breaches of implied-in-fact contract obligations. Plaintiff submits that it produced Agent Orange in the 1960's under written contracts with the Government that contained detailed design specifications developed solely by the Government. It contends further that it had no part in the development of the specifications, that it manufactured the Agent Orange to the exact specifications ordered by the Government, and that it had little, if any, knowledge about the potential hazards that were inherent in the product as produced and used by the Government. Given these factual circumstances, the plaintiff argues that it is entitled to indemnification in contract for the losses it incurred in defending against and settling the tort suits brought by the Vietnam veterans and their families against the manufacturers of Agent Orange. Thompson believes it is only equitable and fair that the Government assume the obligation and be allocated these risks because it ordered the production of Agent Orange to its own specifications, completely controlled the use (or misuse) of the

product, and never shared any information about potential hazards in the product with the manufacturer. In short, if anyone was negligent here, it was the Government and the financial liability should, therefore, be borne by it and not by the innocent manufacturers of Agent Orange. The plaintiff, therefore, contends that it is entitled to be indemnified by the Government for the costs it incurred under any one of three contractual theories.

The plaintiff's first theory involves the matter of the Government's alleged superior knowledge. Here, the plaintiff asserts that there was an implied-in-fact obligation on the part of the Government to reveal its *superior knowledge* concerning the nature and possible health risks of Agent Orange so as to not increase the plaintiff's cost of performance under the contract.

Second, the plaintiff alleges a warranty of specification theory. This theory is based upon an alleged Governmental breach of its implied-in-fact contractual obligation that the Agent Orange it required Thompson to manufacture would be safe and free from defects.

Third and finally, the plaintiff alleges that the Government was bound by an implied-in-fact contractual duty to indemnify Thompson for losses due to the Government's requirement that Thomspon produce Agent Orange.

The defendant, for its part, opposes each one of the plaintiff's three breach of implied-in-fact contract arguments on factual as well as legal grounds. In addition, the defendant asserts that the rationale surrounding the Government contractor defense supplies an independent legal basis for finding in its favor.

After full consideration of the parties' briefs and oral arguments, it is evident to the Court that only the plaintiff's second claim regarding the warranty of specification has any potential vitality. The other two claims bear superficial resemblance to viable implied-in-fact contract

theories, but, upon closer inspection, they do not meet the requirements established in the appropriate precedential case law. However, in the interest of completeness, this Court will discuss each of the plaintiff's three contractual claims and defendant's responses to them.

A. *Plaintiff's Implied-In-Fact Contract Claims.*

1. Doctrine of Superior Knowledge

There is a line of cases which allows Government contractors to recover from the Government the unexpected increased costs of performance of a contract if the Government, at the time the contract was formed, had superior knowledge regarding difficulties in production which were not apparent and were not otherwise known by the contractor. *American Ship Bldg. Co. v. United States,* 228 Ct. Cl. 220, 654 F.2d 75 (1981); *Hardeman-Monier-Hutcherson v. United States,* 198 Ct. Cl. 472, 458 F.2d 1364 (1972); *J.A. Jones Constr. Co. v. United States,* 182 Ct. Cl. 615, 390 F.2d 886 (1968); *Helene Curtis Indus., Inc. v. United States,* 160 Ct. Cl. 437, 312 F.2d 774 (1963); *J.F. Shea Co. v. United States,* 4 Cl. Ct. 46 (1983).

From this precedent, the plaintiff argues that the Government is liable to the manufacturers of Agent Orange for their costs in defending and settling the suits brought against them by Vietnam veterans. This is because the Government allegedly knew more about the hazards of dioxin contained in the Agent Orange than did the herbicide manufacturers, and the Government breached its duty (contractual obligation) to reveal this superior knowledge to the plaintiff.

The defendant counters that the plaintiff was an experienced manufacturer of 2,4,5-T through its commercial products. Also, it complied with the general reporting and registration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135 *et seq.*

(1964) (FIFRA).[7] In view of this, the Government could reasonably assume that the plaintiff had tested its products as required by FIFRA and would be aware of potential hazards associated with 2,4,5-T.

While the determination of how much knowledge both the plaintiff and the Government had about the hazards of dioxin and Agent Orange is fact-intensive and not suitable for summary judgment, this Court believes it is not necessary to reach a decision on this factual issue. In analyzing these cases, it is clear to this Court that the doctrine of superior knowledge covers *only* unexpected costs in the *performance* of the contract. None of the cases cited by the plaintiff involving the doctrine of superior knowledge extend the doctrine beyond the production of the item contracted for, be it disinfectant powder (*Helene Curtis*) or the construction of a dock in Australia (*Hardeman-Monier-Hutcherson*). In all of the cases cited above, the Government knew about some nonobvious obstacles that anyone would encounter in trying to produce the contracted-for item. For example, in *Helene Curtis,* it was a new substance that needed grinding in order to mix properly into the disinfectant powder, and, in *Hardeman-Monier-Hutcherson,* it was severe weather conditions and water currents that made the dock much more difficult to construct.

The common thread is that, in all of these cases, the contractor had to spend more time or money on production than it anticipated when entering into the contract with the Government because of latent difficulties in the manufacturing or construction process. Also, the Gov-

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[7] In addition to the general reporting and registration requirements imposed by FIFRA, 7 U.S.C. § 135a, the act also requires manufacturers to test products prior to marketing them. Specifically, 7 C.F.R. § 162.106 (1949) requires that the manufacturer have the product thoroughly tested by experimenters, and if it is "likely to cause injury to human beings, or desirable plants or animals, its limitations from these standpoints should be determined and adequate cautions placed on the label."

ernment, at the time of contract formation, had knowledge of the latent problems that would raise performance costs and did not divulge this knowledge to the contractors. Thus, citing to *Helene Curtis,* the United States Court of Claims in *American Ship Bldg. Co.,* 228 Ct. Cl. at 225, 654 F.2d at 79, stated that the four factors of the superior knowledge doctrine were:

> [W]here (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

To satisfy the requirements of the doctrine, the vital knowledge, which the Government possesses and the contractor does not, must be a fact that affects *performance costs* or *duration of performance.* In the case at hand, plaintiff does not claim that it had any unforseen problems in the manufacture of the Agent Orange which increased the costs of production or caused a delay in performance. Thus, the superior knowledge doctrine does not apply to plaintiff's claim and does not entitle it to recover costs that were not connected to actual *performance* under the contract, which was for the manufacture of the Agent Orange to the detailed Government specification. *See generally, Lopez v. A.C. & S., Inc.,* 858 F.2d 712, 717-18 (Fed. Cir. 1988), *cert. denied,* 491 U.S. 904 (1989). Prior case precedent simply does not allow the expansion of the doctrine of superior knowledge to be extended as far as the plaintiff apparently wants it to stretch. The time frame that the courts have found appropriate to review has always been the period of performance only—not some indefinite time stretching well into the future.

2. Warranty of Specification.

In *United States v. Spearin,* 248 U.S. 132, 136-37 (1918), the Supreme Court held that the inclusion of detailed specifications in a contract prepared by the Government imported a warranty that, if the specifications were followed, the resulting product would be adequate, and the contractor would not be responsible for the consequences of defects in the specifications. This implied warranty of specification has been recognized in many cases since *Spearin. See e.g., Ordnance Research, Inc. v. United States,* 221 Ct. Cl. 641, 609 F.2d 462 (1979); *Hol-Gar Mfg. Corp. v. United States,* 175 Ct. Cl. 518, 360 F.2d 634 (1966); *Blount Bros. Corp. v. United States,* 872 F.2d 1003 (Fed. Cir. 1989).

In *Spearin,* the defect became apparent due to damage that occurred during the performance of the contract. *Spearin,* 248 U.S. at 134-35. However, the warranty of specification is not limited to the time of performance, according to the holding in *Poorvu v. United States,* 190 Ct. Cl. 640, 420 F.2d 993 (1970). In that case, the defect in the specified construction method did not begin to manifest itself until some four years after the completion of the building, and the United States Court of Claims determined that the *Spearin* warranty of specification still operated to place the liability for the damage on the Government, which had dictated the construction specifications. *Poorvu,* 190 Ct. Cl. at 651, 420 F.2d at 1000.

Plaintiff argues that an implied-in-fact warranty of specification arose in this case because the Government supplied detailed specifications for Agent Orange to Thompson, and the plaintiff manufactured the defoliant in accordance with these detailed specifications. The warranty of specification means that the Government impliedly warranted that the item made to the precise specification would be safe and free from defects. Plaintiff claims that the Government breached this warranty because the plaintiff was subjected to tort suits by third

parties who claimed they were injured by the Agent Orange the plaintiff manufactured.

The Government contends that plaintiff's claim is nearly identical to claims made by the asbestos manufacturers that, based on contract theories, attempted to recover from the United States costs they incurred as a result of suits brought by shipyard workers who were exposed to asbestos dust from using insulating products. The asbestos manufacturers made these products in accordance with military specifications and sold them to the United States during the World War II era and thereafter. Accordingly, the defendant relies on two asbestos-related cases, *Lopez* and *GAF Corp.*, for its defensive position. The Government contends that these cases bar the plaintiff's warranty of specification claim on the grounds that the factual circumstances of this case do not support finding an implied-in-fact agreement, a meeting of the minds, and this Court lacks jurisdiction over contracts that are implied at law. *Lopez,* 858 F.2d at 714-15; *GAF Corp.*, 932 F.2d at 950.

For a warranty to be implied in fact, the plaintiff must demonstrate that "the circumstances strongly supported a factual inference that a warranty was implied." *Lopez,* 858 F.2d at 715. Such an inference arises only when the Government specifications told the contractor "just how to do the job," *Id.* at 716, and not when they merely specified some certain characteristic in the contracted-for product. *GAF Corp.*, 932 F.2d at 950. With respect to the claims of breach of warranty of specification, the Court agrees with the plaintiff that the underlying bases of the decisions in *Lopez* and *GAF Corp.* were that the asbestos companies knew about the dangers of their products before entering into the contracts with the Government and that the products manufactured under the Government contracts did not differ materially from those already sold commercially. Thus, there was no basis for finding a factual inference that the specifications constituted an "extensive Government intrusion into the asbestos pro-

duction process which might suggest that the Government intended to warrant the product's safety." *GAF Corp.*, 932 F.2d at 950.

Plaintiff argues that, in this case, there exists the extensive Government intrusion into the Agent Orange production process that suggests that the Government intended to warrant the product's safety. Also, the plaintiff alleges that it is unlike the asbestos manufacturers because it knew less than the Government did about the defoliant, and Agent Orange differed materially from the products plaintiff sold commercially.

However, even assuming that a warranty of specification arose from the Government's detailed specifications for Agent Orange, there must be more than the mere existence of a warranty to entitle the plaintiff to recover against the Government. Plaintiff must also show that this warranty was *breached* by the Government and that this breach caused plaintiff to suffer the type of damages recoverable in contract. It is on these requirements, breach and contract damages, that the plaintiff has failed to state a case that can withstand the Government's summary judgment motion.

Turning again to *Spearin* and its progeny, the implied warranty of specification was breached when the product, made in accordance with the detailed specification created by the Government, was inadequate, and the inadequacy clearly caused some damage. In *Spearin*, the sewer was inadequate due to a problem with a blocked sewer pipe in the existing system; the new pipe broke, and the sewer overflowed and damaged the dry dock that the contractor was building for the Government. *Id.*, 248 U.S. at 134. In *Poorvu*, the parking area for a building was constructed with inadequate support below it, in accordance with the Government's specifications. This caused the parking area to settle and put pressure on water pipes that were located beneath it. These pipes broke, and the water spilling from them saturated the ground under the building, which then weakened the support under the

building, causing it to settle severely into the ground. *Id.*, 190 Ct. Cl. at 646-47, 420 F.2d at 997.

In these cases, it is clear that the specification was inadequate, and the resulting defect in the finished product caused obvious and direct damage. The courts in these cases appeared to analyze these situations by determining first, whether or not some damage had occurred, and second, whether or not the specification written by the Government was defective. If these two circumstances were present, the courts then determined which party should bear the risk of the faulty specification causing the damage. The implied warranty of specification is the method by which the court can allocate the risk of the faulty specification to the Government, which created the specification, rather than to the contractor, who actually built the defective item that caused the damage. *See* JOHN C. CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 199-202 (2d ed. 1985). As stated in *Spearin*, 248 U.S. at 136, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." Also, the court held in *Poorvu* that "the government must answer for damage incurred because of inadequate plans it has furnished." *Id.*, 190 Ct. Cl. at 651, 420 F.2d at 1000.

In this case, plaintiff asserts that the Government designed faulty specifications for Agent Orange because dioxin contaminated the specified defoliant product. The damage plaintiff claims as a result of the faulty specification is, however, the settlement costs it incurred when veterans claimed they were injured by the dioxin in the Agent Orange used for military purposes in Vietnam. Thus, the plaintiff claims that the Government breached the warranty by subjecting the chemical manufacturer to tort liability running to third parties who were injured by the Government's use of the Agent Orange manufactured

by the plaintiff. However, for several reasons, the plaintiff cannot prove that it was actually subjected to tort liability by third parties because of its manufacture of Agent Orange for the Government's military use. First, dioxin has never been scientifically proven to cause the injuries that the veterans alleged, and second, the plaintiff was protected from liability to the veterans in any event under the Government contractor defense, which is discussed later in this opinion. Thus, to the extent that the warranty of specification does exist in this case, there has been no breach of the implied warranty of specification because the alleged defect in the herbicide has never been proven, and the plaintiff would not have been liable to third parties even if the specifications had been defective due to the Government contractor defense.

It is clear to this Court, after reviewing the many and varied decisions regarding the veterans' suits against the herbicide manufacturers, that Agent Orange and dioxin have never been proven to cause the injuries claimed by the veterans. As stated in the *Settlement Opinion,* "the result of an enormous scientific effort to be helpful on causation has, from the plaintiffs' point of view, left the case at best open. This is not sufficient to support a recovery in tort law * * *." *Id.,* 597 F. Supp. at 795. Likewise, when the claims of the veterans who opted out of the class went forward after the settlement of the class action, the United States District Court for the Eastern District of New York granted summary judgment to the chemical manufacturers (including Thompson) and noted that "years of discovery and tens of millions of dollars spent by the government and others on research has not yielded any competent evidence indicating a genuine issue of fact about causation." *Opt-out Opinion,* 611 F. Supp. at 1260. Thus, plaintiff cannot show that it has been held liable to a third party for damages caused by a defect in the herbicide it produced for the Government under detailed specifications.

As for damages arising from contract breaches, it is axiomatic that such damages are limited to those that were reasonably foreseeable at the time the parties formed the contract. *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854). In *Northern Helex Co. v. United States,* 207 Ct. Cl. 862, 888, 524 F.2d 707, 721 (1975), *cert. denied,* 429 U.S. 866 (1976), the court reviewed the rules governing damages for breach of contract and concluded that the authorities support denial of claims where "costs are too remote, speculative, and consequential to be compensable as damages." In this case, it is apparent that the costs (damages) plaintiff incurred by defending and settling a lawsuit brought by veterans, who were never able to prove that the plaintiff's product injured them, were not reasonably foreseeable at the time the contract was formed between the Government and the plaintiff.

Plaintiff urges that there is a strong judicial policy favoring settlements and the fact that it settled the underlying case, rather than litigating the issue of its liability to the veterans, should not count against plaintiff in its attempt to recover from the Government for breach of warranty. It is true that settlements are encouraged. *See e.g., Ahern v. Central Pac. Freight Lines,* 846 F.2d 47, 48 (9th Cir. 1988); *Janneh v. GAF Corp.,* 887 F.2d 432, 435 (2d Cir. 1989). However, the cases plaintiff cites regarding the recovery of settlements paid to third parties involve indemnification agreements, either implied-in-fact or implied-at-law. *Travelers Ins. Co. v. United States,* 493 F.2d 881 (3d Cir. 1974); *Parfait v. Jahncke Serv., Inc.,* 484 F.2d 296 (5th Cir. 1973), *cert. denied,* 415 U.S. 957 (1974). This Court does not have jurisdiction over contracts implied at law. *United States v. Mitchell,* 463 U.S. 206, 218 (1983). As for an implied-in-fact contract, the factual circumstances do not support one because it simply was not foreseeable to the parties that the Agent Orange class action settlement would come to pass more than a decade after the contracts to supply the defoliant were formed. The facts may support an implied

warranty of specification, but they cannot be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an indemnification agreement between them if the implied warranty of specification was alleged, but never proven, to be violated.

As for plaintiff's claim of attorney fees, the court in *Kania v. United States*, 227 Ct. Cl. 458, 467, 650 F.2d 264, 269, *cert. denied*, 454 U.S. 895 (1981), noted that "jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases." *Also see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Overall, "[c]ourts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made." *Kania*, 227 Ct. Cl. at 467, 650 F.2d at 269. Thus, plaintiff cannot support a contention that it suffered compensable damages to the amount of its legal fees and costs as a result of the Government's alleged breach of the implied warranty of specification.

Finally, the question remains as to whether plaintiff could ever have been found liable to third parties, even if causation between Agent Orange and veterans' injuries had been proven. The Government contractor defense would certainly present a serious obstacle to a manufacturer's liability to military service personnel for defects in products made to Government specifications for military applications. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); and *Feres v. United States*, 340 U.S. 135 (1950). The Government contractor defense will be discussed more fully in a later section of this opinion, but its impact on any liability the plaintiff would have to third parties must be noted at this juncture. The plaintiff asserts, in its arguments involving

superior knowledge, that it manufactured the product to detailed specifications and lacked the knowledge it alleges the Government had regarding the hazards of Agent Orange. If this is true, then the plaintiff would avoid liability to third parties based on the Government contractor defense. *Boyle*, 487 U.S. at 512. The plaintiff had an absolute defense. Plaintiff was well aware of this strong defense before it agreed to settle the claims of the veterans because, in 1983, it was granted summary judgment in its favor on the basis of the Government contractor defense, *Agent Orange*, 565 F. Supp. at 1275, even though plaintiff was later brought back into the case. Thus, in addition to the reasons already discussed above, there was no breach of the warranty of specification based on the manufacturer's tort liability to third parties supposedly injured by the product because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense.

3. Contract Indemnification.

For contractual indemnification to exist and to be actionable in this Court, it must arise from an express or implied-in-fact contract term. As noted earlier, this Court has no jurisdiction over contracts or contract terms which are implied at law. *United States v. Mitchell*, 463 U.S. at 218. While there was no express indemnification term in the procurement contract, plaintiff claims there is an implied-in-fact contract indemnification term springing from section 2157 of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061 *et seq.* (1964) (DPA), and the fact that the Government compelled plaintiff to manufacture Agent Orange. Section 2157 of the DPA provided that:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act * * *.

Based on this section, plaintiff argues that an implied-in-fact indemnification term arose in the procurement contract between the plaintiff and the Government in regard to its Agent Orange contracts.

Plaintiff and the other chemical manufacturers also raised section 2157 as a defense in the district court suit brought by the veterans. However, Chief Judge Weinstein explained that section 2157 of the DPA was enacted as a *quid pro quo* to 50 U.S.C. app. § 2071, which authorizes the President to require that performance of contracts under the DPA take priority over other contracts currently binding the manufacturer. *Settlement Opinion*, 597 F. Supp. at 844. Thus, the court concluded that,

> Logically, then, the protection afforded by section [2157] should correspond to the risk imposed, viz., the possible need for the contractor to break its contracts with third parties or the increased risk to employees or users posed by speeded-up production. Except in rare instances there is no logical connection between the compulsion of section [2071] and the risk of injuries to those using or exposed to the contractor's product; the risk is something that all government contractors have in common and is already taken into account in the government contract defense.

Id. at 845.

This Court agrees with the district court and finds that the DPA does not create an implied-in-fact contract term which would indemnify the plaintiff for any tort suits brought by users of the product the plaintiff made for the Government under the DPA. Instead, section 2157 provides the Government contractor with a defense. This defense excuses the Government contractor's breach of its other, non-Government contracts which were adversely affected by the priority given to the Government's procurement demands under the DPA. *See e.g., Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957,

997 (5th Cir. 1976). It does not create an indemnification agreement between the Government contractor and the Government to cover tort damages suffered by users of the product procured under the DPA. *Settlement Opinion*, 597 F. Supp. at 845.

However, even if this Court were to assume, which it does not, that such an implied-in-fact contract term arose from the dealings between the parties alone, the term itself could not operate to bind the Government. It is clear that the United States cannot be bound by a contract, or a term within a contract, into which its agents were without the legal authority to enter. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). This principal applies regardless of whether or not the contract is express or implied. *Sutton v. United States*, 256 U.S. 575, 580 (1921). However, the plaintiff cannot show that the agent of the Government had the authority to enter a binding indemnification agreement because, for indemnity to exist, there must be either a prior appropriation to cover the possible costs of indemnity and/or a statutory exception to this rule permitting such payments. *See Matter of: Assumption by Government of Contractor Liability to Third Persons—Reconsideration*, 62 Comp. Gen. 361 (1983). This is because an unfunded or unexcepted indemnification term would violate the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988), which bars a federal agency from entering into a contract for future payments in excess of an existing appropriation. The Anti-Deficiency Act states, in pertinent part, that officers or employees of the United States may not:

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341 (1988).

Thus, in *California-Pacific Util. Co. v. United States*, 194 Ct. Cl. 703 (1971), the United States Court of Claims dismissed an indemnification claim brought by a utility company seeking to recover amounts paid in settlement to a federal employee injured by one of its electric poles. The Court stated that:

> The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Anti-Deficiency Act] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated.

Id., 194 Ct. Cl. at 715.

In the present case, plaintiff presents no appropriation or statutory exemption [8] which would authorize indemnification in this case. Thus, even if an implied indemnification agreement existed, it would be unenforceable under the Anti-Deficiency Act. Therefore, the plaintiff has no grounds for recovery on any contractual indemnification theory.

After consideration of all of the plaintiff's contractual arguments, it is apparent that most of the theories plaintiff advanced do not apply to hold the Government liable for the amount paid in connection with the settlement of the class action suit. The warranty of specification might apply to the Government based on the detailed specification for the production of Agent Orange. However, plaintiff has failed to come forth with the required quantum of proof regarding the breach of this warranty and the contract damages flowing therefrom. Thus, the moving

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[8] As earlier stated, section 2157 of the DPA does not create a contractual indemnification agreement between Thompson and the Government, but only a defense. Such a defense is to be utilized by the Government contractor in the event the DPA contracts have placed the contractor in breach of its other non-Government contractual commitments.

party is entitled to summary judgment because the non-moving party, the plaintiff, has "failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex v. Catrett*, 477 U.S. at 323.

B. *The Government Contractor Defense*

Even if this Court is in error when it finds no breach and no damages as a matter of law in this case, the plaintiff would still not be able to recover in this action because of the Government contractor defense. The defendant alleges that, regardless of the resolution of the contractual issues in this matter, the Government contractor defense provides a *separate* and *independent* basis for a denial of the plaintiff's claims. Based on the policies underlying the Government contractor defense, the defendant states that the plaintiff cannot be allowed to recover indirectly through this contract suit for reimbursement what the veterans could not recover directly against the Government under the Federal Tort Claims Act, 28 U.S.C. § 2671-80 (1988) (FTCA), i.e., tort damages from the Government payable to military personnel for injuries allegedly sustained while serving on active duty.

Plaintiff counters that the Government contractor defense was not settled law at the time of the settlement with the veterans in the class action suit, so there was the possibility that it might have been held liable to the veterans for billions of dollars. Thus, their decision to settle was very reasonable in the face of the possibility of massive liability. Also, the plaintiff asserts that the Government, in a brief it filed in the *Opt-out Opinion* in the district court action, argued against the application of the Government contractor defense to shield the herbicide manufacturers from liability, and thus the Government should be estopped from urging its application here.

While the Government contractor defense is certainly important to the resolution of the issues in this case, both

parties have neglected to consider crucial matters in support of their respective arguments. What is primarily at issue in this case is the *Government's liability* to the plaintiff under these circumstances, not just the plaintiff's liability to the veterans. Fortunately, this issue has already been considered by the Supreme Court in *Stencel*, and this Court will follow its clear guidance in the instant case.

In *Stencel*, a serviceman, who was injured when the ejection system of his fighter aircraft malfunctioned, brought a product liability damage action against the manufacturer, Stencel, and the United States. Stencel cross-claimed against the Government for indemnity claiming that any malfunction in the system was due to faulty Government specifications and components. Based on the earlier *Feres* case, the Supreme Court upheld the district court's grant of summary judgment for both the Government and Stencel against the serviceman and also upheld the dismissal of Stencel's cross-claim against the Government.

In the *Feres* case, the Supreme Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the FTCA. *Id.*, 340 U.S. at 146. The Supreme Court in *Stencel* reviewed the *Feres* decision and concluded that it rested on three factors. First, the Supreme Court found that the relationship between the Government and its military personnel is distinctively federal in character, and, thus, it would not make sense to have the liability of the Government to an injured serviceman depend on the law of the place where the injury occurred. Second, the Supreme Court determined that the statutory compensation scheme, which provides pensions and medical services to injured servicemen without regard to any negligence by the Government, stands as a legal substitute for allowing the Government to be sued in tort for negligence. Third and finally, the Supreme Court concluded that military discipline and the relationship between a

soldier and his superiors, which has no counterpart in civilian affairs, might be distorted by the imposition of tort liability. *Stencel*, 431 U.S. at 671-72.

In the case of the contractor suing the Government, the Supreme Court determined that the same factors were relevant and that it must "consider the impact of these factors where, as here, the suit against the Government is not brought by the serviceman himself, but by a third party seeking indemnity for any damages it may be required to pay the serviceman." *Id.*, 431 U.S. at 672. The first factor, the application of federal rather than state law, and the third factor, the effect of tort liability on military discipline, operated with equal force in suits by the serviceman and suits by the contractor. *Id.*, 431 U.S. at 672-73. The second factor, the existence of the military compensation scheme, the Supreme Court found more difficult to apply in the case of the contractor suing to recover funds it had paid to the serviceman. However, it concluded that the compensation scheme served the dual purpose of providing an efficient remedy for the injured serviceman and also protected the Government through its limitation of liability provisions which provide an upper limit on the Government's liability for service-connected injuries. *Id.*, 431 U.S. at 673. Thus, in *Stencel*, 431 U.S. at 673, the Supreme Court determined that:

> To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." [Citations omitted, alterations and omissions in original.]

Therefore, the contractor was not allowed to recover from the Government where the underlying claim for which the

contractor was seeking indemnity was made by an injured serviceman. In conclusion, the Court observed that "[s]ince the relationship between the United States and [the contractor] is based on a commercial contract, there is no basis for a claim of unfairness in this result." *Id.*, 431 U.S. at 674.

The situation analyzed in *Stencel*, a contractor seeking indemnity from the United States for claims made by an injured serviceman, is analogous to plaintiff's claim in this case. Plaintiff in this action is seeking repayment from the Government of amounts it paid to injured military service personnel based on the Government's provision of specifications for the product which allegedly harmed the military service personnel. BLACK'S LAW DICTIONARY 769 (6th ed. 1990) defines indemnity as "reimbursement." Reimbursement of the amounts it paid in settlement and legal fees is what plaintiff requests here, and, thus, the strictures of the *Stencel* case apply and foreclose plaintiff's claim that the Government must reimburse it for its costs and fees in connection with the Agent Orange litigation. This suit by the plaintiff is a "back door" attempt to recover from the Government what the *Feres* doctrine blocked at the front door; that is, damages for injuries suffered by servicepersons in the line of duty. Accordingly, the rationale of *Stencel* requires this Court to deny the plaintiff's claim.

The reasoning of *Feres* and *Stencel* was later amplified and extended by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which involved an action between private parties but implicated the Federal Government's interests. In *Boyle*, a United States Marine co-pilot was killed when his helicopter crashed into the water during a training exercise. Although the Marine survived the impact, he was unable to escape from the submerged helicopter and drowned. Based on state tort law, the Mairne co-pilot's estate sued the Government contractor that built the helicopter, claiming that the escape hatch was designed negligently because it opened

outwards and was unusable when the helicopter was under water, due to the pressure of the water outside the submerged craft. The Government contractor (United Technologies) contended that it made the escape hatch to the precise specifications required by its contract with the Government and therefore was not liable under state tort law.

Even though it was a state law tort suit between private parties, the Supreme Court found that "the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is one between private parties." *Id.*, 487 U.S. at 506. Thus, federal law could possibly apply. However, for federal law to displace state tort law, there must be a significant conflict between a federal policy and the operation of the state tort law. *Id.*, 487 U.S. at 507. Looking at the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1988) (FTCA), the Supreme Court indentified a provision that suggested the outlines of a significant conflict between federal interests and state tort law in the area of Government procurement. While the FTCA authorized suits against the Government for harm caused by the negligent or wrongful conduct of Government employees in certain circumstances, it specifically excepted from consent to suit any claims based on the exercise of a discretionary function by a federal agency or employee, 28 U.S.C. § 2680(a) (1988). *Boyle*, 487 U.S. at 511. The Court determined that:

> [T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments * * * through state

> tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. [Citations omitted.]

Id. Thus, the state law, which would hold the Government contractor liable for design defects in military equipment, is displaced by the federal policy and law of deferring to military discretion in the procurement of military equipment embodied in the FTCA.

The Supreme Court in *Boyle* adopted a three-part test to determine when, to avoid conflict with the discretionary function exception, displacement of state law is appropriate. It stated:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id., 487 U.S. at 512. If the contractor satisfies this test, then it is not subject to tort liability under state law for defects in equipment it manufactured for the military in conformance with precise specifications provided by the Government. This is because such liability would infringe on the discretionary function exception to the FTCA by allowing a state court to second-guess indirectly the Government's judgment in the selection of the appropriate design for military equipment.

Relying on the Government contractor defense, the defendant argues here that the plaintiff's Tucker Act claim for contractual damages, just like a state court tort suit, is an attempt to have the judiciary second-guess the Government's decision to procure and employ Agent Orange. The defendant claims that this flies in the face of the Government contractor defense and the discretionary function exception and that it does violence to the policy

of Government discretion in military procurement which these doctrines protect. Thus, based on the policies underlying the Government contractor defense, the defendant contends that the plaintiff is barred from recovery on its Tucker Act claim.

The Government contractor defense is important to the instant case for two reasons. First, its underlying policies, as expressed in *Boyle*, are to protect the discretion of the Government in procuring military equipment, as mandated by the discretionary function exception to the FTCA. Therefore, this Court must determine whether these policies apply equally to suits by contractors against the Government as they do to suits by injured military personnel against the contractor, which *Boyle* addressed specifically. Second, this Court must consider whether the Government contractor defense operated in the suits plaintiff faced and provided plaintiff with such a strong defense that it is without grounds to claim that it was actually in grave danger of being held liable to third parties in tort for injuries stemming from the product it produced for the Government.

This Court agrees with the defendant's argument that the policies supporting the *Boyle* decision apply with equal force to an attempt by a Government contractor to sue the Government directly. The Supreme Court in *Boyle* was concerned with preserving the discretion of the military in choosing the appropriate design for military equipment because this choice involves balancing many conflicting considerations, including the trade-off between safety and combat effectiveness. *Id.*, 487 U.S. at 511. This exact same discretion and balancing by the Government is implicated in the case at issue.

The Government procured Agent Orange to serve military needs in Vietnam. The product was designed and used to save American soldiers' lives by eliminating possible hiding places for the Viet Cong and North Vietnamese troops. Trade-offs between the effectiveness of

Agent Orange and its safety were a necessary part of the Government's procurement and design activities. This Court agrees with Chief Judge Weinstein, who found that "[t]he information available makes it clear that the government would have concluded that the beneficial saving of American soldiers' lives by defoliating the Vietnamese jungles far outweighed any minimal risks to our own or allied troops posed by exposure to Agent Orange." *Opt-Out Opinion*, 611 F. Supp. at 1263-64. As another court has noted, "[i]t is this sort of balancing which the *Boyle* defense protects, by providing for contractor immunity where state tort law would hold the contractors liable for injuries resulting from the government's design deficiencies." *In re Aircraft Crash Litig.*, 752 F. Supp. 1326 1370 (S.D. Ohio 1990), *aff'd without op.*, 935 F.2d 269 (6th Cir. 1991). Thus, this Court will heed the warning in *Boyle*, 487 U.S. at 511, and not second-guess military procurement decisions made by the Government in the guise of allowing the plaintiff contractor to recover from the Government payments made to injured service persons. Also, this Court will not restructure the United States' immunity and consent to tort suits, which are specified by the FTCA and its exception for discretionary functions, through the vehicle of a contract claim based on tort damages, especially in light of the expansion of immunity clearly manifested in *Boyle*. *Lopez*, 858 F.2d at 718.

Plaintiff argues that the Government contractor defense would not have applied to shield it from liability if the veterans' suit had not been settled because the unwanted dioxin which contaminated the Agent Orange was not a part of the Agent Orange policy considerations which are protected by the discretionary function exception. Plaintiff admits that the decision to use Agent Orange was a discretionary governmental decision but alleges that the use of design specifications which resulted in contamination was not a policy level determination protected by the discretionary function exception. Plaintiff claims this type

of parsing a decision into bits that are either discretionary or nondiscretionary is supported by the holding in *United States v. Gaubert*, —— U.S. ——, 111 S. Ct. 1267 (1991). However, it is clear that *Boyle* has already decided that the procurement of military equipment, when the United States Government approved reasonably precise specifications, is subject to the discretionary function exception. *Id.*, 487 U.S. at 512. This is the first prong of the *Boyle* test, and, along with the second prong, it assures that "the suit is within the area where the policy of the 'discretionary function' would be frustrated—*i.e.*, they assure that the design feature in question was considered by the Government officer, and not merely by the contractor itself." *Id.* Therefore, since *Boyle* clearly holds that the procurement of military equipment by the Government under reasonably precise specifications is a discretionary function, there is no need to apply the more general analysis of a discretionary function in *Gaubert*. Plaintiff has repeatedly urged that the Government created the precise specifications, that it followed these specifications exactly, and that it was unaware of any hazards which the Government may have known about. Thus, by plaintiff's own factual assertions, it is evident that the procurement of Agent Orange, even though contaminated by dioxin, was a discretionary function of the Government.

Plaintiff submits that *Boyle* was several years subsequent to the settlement in this case in 1984, and that, in 1984, the application of the Government contractor defense was, at best, uncertain. In effect, plaintiff argues that *Boyle* created a new doctrine and that it should not be applied retroactively. This raises the second reason for consideration of the Government contractor defense; namely, its availability to the plaintiff as a defense in the state tort suits it faced. The defendant contends that the plaintiff would never have been required to pay the veterans for their alleged injuries because, as a Government contractor, the plaintiff was completely protected by the

Government contractor defense. The Government notes that plaintiff was, in fact, granted summary judgment earlier against the opt-out claimants in view of the Government contractor defense in the district court. *Opt-out Opinion*, 611 F. Supp. at 1263-64. Also, the United States Court of Appeals for the Second Circuit affirmed on this basis, because "[s]ubjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond its constitutional authority and constitutional competence." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 191.

Plaintiff argues that it is unfair to retroactively apply *Boyle*, which was decided in 1988, to the issues plaintiff faced at the time of the settlement in 1984. However, this Court is not applying *Boyle* retroactively. The Government contractor defense existed long before *Boyle*. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). Instead, using *Boyle* as a guide, this Court is applying the holdings of *Feres* (1950) and *Stencel* (1977), as discussed earlier, and the discretionary function exception to the FTCA, to the issues presented in this case. *Feres*, *Stencel*, and the FTCA were all operative at the time of the settlement in 1984 and would have barred a military contractor's tort liability to injured military service personnel. In fact, the defense was fully discussed by Judge Pratt in his 1983 decision, which granted the plaintiff's motion for summary judgment and allowed the plaintiff to be removed from the class action suit based on the operation of the Government contractor defense. *Agent Orange*, 565 F. Supp. at 1265. Thus, the later decision in *Boyle* did not chart a new course for Government contractors. It merely enunciated and clarified the Government contractor defense which already existed.

As a final note, plaintiff also argues that the Government has taken inconsistent positions, by opposing the Government contractor defense in the district court and supporting it in this case. Plaintiff claims that the Government should be estopped from asserting a different

position in this case than it took in the earlier case in which it filed the brief. Under *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), it is unlikely that estoppel will be found against the Government without a showing of fraud or affirmative misconduct by the Government. *Heckler v. Community Health Serv., Inc.*, 467 U.S. 51, 67 (1984); *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981); *Jana, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991), *cert. denied*, 116 L. Ed. 2d 775 (1992); *Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991); *Portmann v. United States*, 674 F.2d 1155, 1164 (7th Cir. 1982); *People's Bank & Trust Co. v. United States*, 7 Cl. Ct. 665, 668-69 (1985). No fraud has been shown or even alleged here, but plaintiff does claim affirmative misconduct on the part of the Government. However, even if plaintiff were able to meet the extremely stringent standard necessary to prove affirmative misconduct, *see e.g., Immigration & Naturalization Serv. v. Miranda*, 459 U.S. 14, 17-18 (1982), plaintiff's estoppel argument still fails on more basic grounds. Even assuming that the Government is ever subject to estoppel, a party cannot prevail without at least showing that the traditional elements of estoppel are present. *Lyng v. Payne*, 476 U.S. 926, 935 (1986). Plaintiff's claim does not meet the basic elements of traditional estoppel, which arises when "one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act" which changes his position for the worse. *Heckler v. Community Health Serv., Inc.*, 467 U.S. at 59 (quoting RESTATEMENT (SECOND) OF TORTS § 894(1) (1979)). In this case, the plaintiff did not *rely* on the assertions in the Government's brief either in its decision to settle or in its defense in the opt-out cases for which the brief was filed. The assertions in the Government's brief did not affect the plaintiff's settlement decision because the brief in question was filed in another case on August 31, 1984, several months *after* the decision to settle was announced in

the class action suit, which occurred on May 7, 1984. *Settlement Opinion*, 597 F. Supp. at 748. Also, in the opt-out cases, the plaintiff must have pressed the Government contractor defense regardless of the Government's brief because the plaintiff received summary judgment against the opt-out claimants based in part on the operation of the Government contractor defense. *Opt-out Opinion*, 611 F. Supp. at 1263. Thus, plaintiff cannot establish its reliance on the assertions of the Government, and so it fails to meet the traditional and basic requirements of estoppel.

In final summary, the plaintiff has failed to convince this Court that it can recover on any one of its implied-in-fact contract theories. Further, even if any one of its three contract theories could be found to be factually supportable, the plaintiff would still lose this lawsuit because of the application of the Government contractor defense to the undisputed facts.

CONCLUSION

For the reasons stated above, the defendant's motion for summary judgment is granted, and the complaint is to be dismissed.

No costs.

[Filed Apr. 22, 1992]

IN THE UNITED STATES CLAIMS COURT

No. 90-391 C

WM. T. THOMPSON COMPANY,
A MISSOURI CORPORATION

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of April 22, 1992, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

DAVID A. LAMPEN
Clerk of Court

April 22, 1992 By: /s/ Linda A. Elkins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5124

HERCULES INCORPORATED,
Plaintiff-Appellant,
v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

[Filed Jul. 7, 1994]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 14, 1994.

FOR THE COURT,

FRANCIS X. GINDHART
Clerk

By /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

Dated: July 7, 1994

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5138

WM. T. THOMPSON COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

[Filed Jul. 7, 1994]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 14, 1994.

FOR THE COURT,

FRANCIS X. GINDHART
Clerk

By /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

Dated: July 7, 1994

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5124

HERCULES INCORPORATED,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

92-5138

WM. T. THOMPSON COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims in CASE NO(S). 90-496C and 90-391C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

DATED May 4, 1994

ISSUED AS A MANDATE: July 14, 1994

Supreme Court, U.S.
FILED
MAR 9 1995
OFFICE OF THE CLERK

(2)

No. 94-818

In the Supreme Court of the United States

OCTOBER TERM, 1994

HERCULES, INCORPORATED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether supply contracts between the United States and petitioners included an implied-in-fact obligation on the part of the United States to reimburse petitioners for the cost of litigating and settling certain third-party product liability claims.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-818

HERCULES, INCORPORATED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 24 F.3d 188. The opinions of the United States Claims Court (now the Court of Federal Claims) (Pet. App. 47a-80a, 82a-115a) are reported at 25 Cl. Ct. 616 and 26 Cl. Ct. 17.

JURISDICTION

The judgment of the court of appeals (Pet. App. 121a) was entered on May 4, 1994. Petitions for rehearing were denied on July 7, 1994. Pet. App. 117a-120a. On September 26, 1994, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 4,

1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1964 and 1968 the United States purchased quantities of the defoliant Agent Orange from several herbicide manufacturers, including petitioners. Pet. App. 3a; C.A. App. 464-482, 573-618. The defoliant was produced in accordance with government specifications and was used, as the manufacturers were aware it would be, in fighting the Vietnam War. See Pet. App. 49a-50a, 84a-85a. The relevant procurement contracts contained no express warranty or indemnification provisions. *Id.* at 19a n.8.

Depending on how it is produced, Agent Orange may contain varying amounts of a toxic by-product known as dioxin.[1] Pet. App. 3a. Beginning in 1979, a number of Vietnam veterans and their families sued the manufacturers of Agent Orange, including petitioners, seeking compensation for injuries allegedly caused by exposure to the defoliant during the war. Despite the ensuing litigation and years of investigation and controversy, it has never been established that exposure to dioxin caused the various

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[1] The courts below made no findings on the emergence, over time, of concerns about the possible hazards of dioxin. There is no doubt, however, that the larger manufacturers of Agent Orange developed considerable knowledge in that regard. Indeed, petitioner Hercules altered its production methods to eliminate dioxin following a meeting called by Dow Chemical Company in 1965. The government was not informed of or invited to attend that meeting. Pet. App. 4a, 49a-50a & n.5.

injuries alleged by the plaintiffs in those actions. See Pet. App. 48a n.2, 64a-65a, 83a n.2, 97a-98a.

The Agent Orange cases were consolidated in the Eastern District of New York. In 1983, Judge Pratt, sitting by designation after his elevation to the court of appeals, granted motions for summary judgment in favor of several of the defendants, including petitioners, based in part on the government contractor defense. Pet. App. 4a-6a; *In re "Agent Orange" Product Liability Litigation*, 565 F. Supp. 1263, 1275 (E.D.N.Y. 1983). That defense generally shields from third-party tort liability contractors who follow detailed government specifications, who know no more than the government about any hazards those specifications may present, and who do not withhold any relevant information from the government. See, *e.g.*, Pet. App. 5a-6a, 21a-22a. Judge Pratt did not sign formal judgments of dismissal to implement the summary judgment, however, and the cases were subsequently reassigned to Chief Judge Weinstein.

Chief Judge Weinstein reconsidered and denied the defendants' motions for summary judgment, and set the case for trial. See Pet. App. 7a, 36a n.2. On the eve of trial the parties entered into a settlement calling for a total payment of $180 million, to which each defendant contributed based on its share of the total volume of Agent Orange produced, adjusted for the level of dioxin in its product. *Id.* at 7a. The United States was not a party to the settlement, took no part in the settlement discussions, and expressed no view on the applicability of the government contractor defense in the settled cases. See Pet. App. 114a-115a; *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 160 (2d Cir. 1987). Petitioner Hercules' share of the settlement payment was approxi-

mately $18.8 million; petitioner Thompson's share was approximately $3.1 million. Pet. App. 7a. In affirming the settlement, which it characterized as "essentially a payment of nuisance value" by the defendants, the Second Circuit observed that the district judge "clear[ly] * * * viewed the plaintiffs' case as so weak as to be virtually baseless." *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 151, 171 (2d Cir. 1987), aff'g 597 F. Supp. 740 (E.D.N.Y. 1984), cert. denied, 484 U.S. 1004 (1988).

Nearly 300 plaintiffs opted out of the Agent Orange settlement. Pet. App. 7a. Chief Judge Weinstein subsequently granted summary judgment against the non-settling plaintiffs, "primarily on the ground that the plaintiffs had failed to present credible evidence of a causal link between exposure to Agent Orange and the plaintiffs' alleged injuries," and alternatively because "the defendant companies were insulated from liability by the government contractor defense." [2]

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[2] During the opt-out litigation, the United States argued that the applicability of the government contractor defense in those cases should not be resolved on the pending motion for summary judgment. The government did not question the availability of the defense in appropriate circumstances. Rather, the government argued that the defense should not apply to claims of negligent manufacturing of defective goods under government contracts, and that there were remaining factual issues, requiring at least further discovery, with respect to each element of the defense: whether the government "established the specifications" for Agent Orange with respect to the presence of dioxin, whether the Agent Orange produced by various manufacturers actually met the government's specifications, and whether particular manufacturers were aware of possible product hazards of which they failed to apprise the government. See C.A. App. 662-697; Pet. App. 104a, 113a-115a.

Id. at 8a. In related rulings, the district court and the Second Circuit also rejected third-party claims by the manufacturers, including petitioners, against the government, seeking tort-law indemnification for or contribution to the settlement. See *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 204 (1987).

2. Petitioners filed separate breach-of-contract actions against the United States, once again seeking reimbursement for the costs of litigating and settling the Agent Orange litigation. See Pet. App. 9a. Both petitioners alleged that the government had made and breached an implied warranty of specifications with respect to Agent Orange. See *id.* at 9a-10a. Petitioner Thompson also contended that the government had an implied obligation to indemnify Thompson because Thompson's manufacture of Agent Orange was compelled by the government under the Defense Production Act (DPA), 50 U.S.C. App. 2061 *et seq.* Pet. App. 10a.[3]

The Claims Court (now the Court of Federal Claims) granted summary judgment in favor of the United States.[4] The court concluded (Pet. App. 64a-

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[3] Both petitioners also alleged breach of an implied obligation to divulge superior knowledge of intended uses and risks. In addition, petitioner Hercules alleged breach of implied obligations to act in good faith and to exercise due care in the use of Agent Orange. Pet. App. 9a-10a. The courts below rejected those contentions. *Id.* at 15a-16a, 25a-27a, 56a-60a, 91a-92a. Because petitioners do not renew them in this Court, we do not discuss them further here.

[4] While petitioners correctly state that no discovery was taken in the Claims Court actions (Pet. 8), they fail to note that the parties presented to the court undisputed documents and testimony from discovery in the extensive Agent Orange

68a, 96a-99a) that even if a warranty of specifications were implied, the course of prior judicial proceedings indicated that petitioners could not prove the existence of damages caused by an injurious defect in the government's specifications, because it had not been established that the tort plaintiffs were harmed by Agent Orange. Moreover, the court held (*id.* at 67a-68a, 99a-100a) that there could have been no breach of any warranty of specifications, "because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense." *Id.* at 68a, 100a. The court also held (*id.* at 78a-79a, 102a-103a) that to the extent petitioners' claims depended on implied indemnities in their government contracts, they were barred by the Anti-Deficiency Act, 31 U.S.C. 1341. That Act provides that officers and employees of the United States may not normally authorize expenditures in excess of funds already appropriated by Congress.

The court also rejected (Pet. App. 100a-102a) petitioner Thompson's argument that a contractual indemnity should be implied on the basis of the Defense Production Act.[5] Section 707 of that Act, 50 U.S.C. App. 2157, provides in part that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to [the DPA]." The court held that Section 707 provides only a defense to actions claiming

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litigation before the district court in New York. See, *e.g.*, C.A. App. 263-421.

[5] Petitioner Hercules did not rely on the DPA before either the Claims Court or the Federal Circuit. See Pet. App. 14a, 28a.

breach of non-government contracts adversely affected by the priority that is accorded to government orders under the DPA, not an indemnity for tort damages paid to third parties injured by products manufactured under such orders.

Finally, the court determined that petitioners' claims were fundamentally inconsistent with the government contractor defense. Pet. App. 68a-78a, 104a-115a. The court agreed with the government (*id.* at 75a-76a, 110a-111a) that the purpose of the defense—to insulate government procurement decisions from considerations of potential future tort liability—would be subverted by allowing a contractor to require government reimbursement of tort damages that the contractor could have avoided by invoking the defense. The court also agreed (*id.* at 76a-77a, 111a-113a) that petitioners could have invoked the government contractor defense to avoid all liability in the prior Agent Orange litigation, just as they invoked it to avoid liability to plaintiffs who opted out of the class-action settlement. Thus, the court concluded (*id.* at 80a, 115a) that petitioners could not prevail in this litigation because recovery against the government would be inconsistent with the rationale of the government contractor defense.

3. The court of appeals consolidated petitioners' cases and affirmed. Pet. App. 1a-33a. The court agreed (*id.* at 18a-19a & n.8) that scientific proof of dioxin-related injuries was "sparse," and that, in any event, "the facts would have to be stretched" to conclude that the government had made and breached an implied warranty of specifications that would permit petitioners to recover their litigation and settlement costs. The court chose to rest its decision, how-

ever, on the ground that petitioners "cannot prove that their damages were caused by the government's alleged breach * * * because [petitioners] were protected from liability to the Agent Orange plaintiffs by the government contractor defense." *Id.* at 19a-20a. Observing that petitioners "successfully argued on three separate occasions that the government contractor defense shielded them from liability for the veterans' tort claims," the court concluded that "there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed" against them. *Id.* at 23a. Thus, in the court's view, petitioners made a voluntary decision to settle rather than to press their defense in litigation, and their contributions to the settlement fund resulted from that decision, not from any breach of a contractual duty by the government. *Ibid.*

The court of appeals also rejected (Pet. App. 28a-33a) petitioner Thompson's argument that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, created an implied contractual commitment by the government to indemnify DPA contractors for losses arising from tort suits brought by third parties. Like the Claims Court (and the district court that approved the class action settlement), the court concluded (Pet. App. 33a) that Section 707's protection "extends no further than the risk imposed by" Section 101(a) of the DPA, which authorizes the President to require that performance under defense contracts "take priority over performance under any other contract or order." 50 U.S.C. App. 2071(a). The court thus interpreted Section 707 to provide only "a defense for a DPA contractor against a suit

by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements." Pet. App. 29a. "Accordingly, invocation of the DPA by the government * * * did not give rise to an implied-in-fact contractual obligation * * * to indemnify Thompson for its contribution to the Agent Orange settlement fund." *Id.* at 33a.

Judge Plager dissented. Pet. App. 34a-46a. In his view, approval of the Agent Orange settlement and the uncertain scope of the government contractor defense at the time of the settlement made it impossible to conclude that petitioners would have faced no liability had they gone to trial. *Id.* at 35a-40a. Judge Plager would also have read Section 707 of the DPA as a general "hold harmless" provision, under which the government was required to indemnify petitioner Thompson for any damages, including third-party tort liability, arising out of Thompson's production of Agent Orange. Pet. App. 43a-45a.

ARGUMENT

Petitioners manufactured Agent Orange under contracts with the government. Years after the completion of performance under those contracts, petitioners were sued by third parties who claimed to have been injured by the government's military use of Agent Orange. In that litigation, petitioners properly raised the government contractor defense. The first district judge to consider the matter granted summary judgment for petitioners on the basis of that defense. That decision was withdrawn by a sec-

ond district judge, but both he and the Court of Appeals for the Second Circuit later relied in part on the defense in affirming a partial settlement of the litigation, in granting petitioners summary judgment against plaintiffs who opted out of the settlement, and in rejecting petitioners' third-party claims against the United States for indemnity and contribution. This Court denied further review of two of those decisions.[6] Petitioners have now reformulated their claims for reimbursement in the language of implied warranty and contractual indemnity.

1. Petitioners' primary contention is that they have been "barred from suing the government for breach of an implied warranty of specifications."[7] Pet. 12; see also Pet. 11. The courts below did not, however, "preclude[]" petitioners from bringing their breach

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[6] See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 795-799, 843-850 (E.D.N.Y. 1984) (approving settlement), aff'd, 818 F.2d 145, 173-174 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1263-1264 (E.D.N.Y. 1985) (dismissing opt-out cases), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1221, 1223 (E.D.N.Y. 1985) (dismissing third-party claims against the United States), aff'd, 818 F.2d 204, 210 (2d Cir. 1987).

[7] As noted above (see note 3, *supra*), petitioners do not renew in this Court their claims based on an implied obligation to divulge superior knowledge, and petitioner Hercules does not renew its claims based on implied obligations to act in good faith and to exercise due care. Cf. Pet. 8 n.7. Because the petition presents no question with respect to those claims, we do not address them.

of contract claim (Pet. i). Rather, as the court of appeals pointed out (Pet. App. 18a), the Claims Court rejected that claim on the merits, for three independent reasons: (i) because any implied warranty of specifications that might be found would not provide for the kind of recovery sought by petitioners, (ii) because the absence of scientific evidence regarding the consequences of dioxin exposure would preclude a finding that any such warranty was breached, and (iii) because the availability of the government contractor defense in the prior tort litigation would preclude a finding that petitioners' damages were caused by the government's alleged breach of such a warranty. The court of appeals indicated its likely agreement with the first two holdings, although it explicitly reached and affirmed only the third. *Id.* at 18a-20a & n.8. Any of the trial court's grounds is sufficient to support the judgment below.

a. Petitioners concede that their contracts with the government included no express warranty or indemnity of any kind. See Pet. App. 19a n.8. They argue instead (Pet. 12-13) that such a provision was implied in fact, and that the Claims Court's decision to the contrary (Pet. App. 66a, 98a-99a) conflicts with this Court's decision in *United States* v. *Spearin*, 248 U.S. 132 (1918).[8]

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[8] The Court of Federal Claims' jurisdiction under 28 U.S.C. 1491 extends only to contractual obligations that are either express or implied in fact; it does not reach obligations that are "implied in law." *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); see also *Lopez* v. *A.C. & S., Inc.*, 858 F.2d 712, 714-715 (Fed. Cir. 1988), cert. denied, 491 U.S. 904 (1989) (implied warranty claims by suppliers of asbestos insulation).

Spearin involved a contractor who agreed to build a drydock according to detailed plans provided by the Navy. The plans called for the contractor to relocate a sewer in a specific manner, which he did. A defect in the Navy's plan of the existing sewer caused the relocation to be unsatisfactory, leading to additional costs and a dispute over completion of the contract. 248 U.S. at 133-135. The contractor sued, and this Court upheld a judgment in his favor for costs and lost profits. *Id.* at 138-139. Noting that the contractor had no knowledge of the plan defect and that his independent investigation of the site was adequate under the circumstances (*id.* at 134-135, 137), the Court held that the government's "insertion [into the contract specifications] of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate."

The facts of this case are remote from those of *Spearin*. Petitioners do not claim direct contract damages based on a contention that some defect in the government's specifications rendered the manufacture of Agent Orange more difficult or expensive than they expected, or caused the product, although properly manufactured, to be unfit for its intended use. Rather, they claim remote and consequential damages arising from the settlement of unproven third-party tort claims related to the government's use of the Agent Orange produced. The Claims Court recognized that distinction when it explained (Pet. App. 65a-66a, 98a-99a; emphasis added) that even if the facts might present a triable issue of fact concerning the existence of an implied *warranty* under

Spearin, they could not plausibly "be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an *indemnification* agreement between them if the implied warranty of specifications was alleged, but never proven, to [have been] violated."

The court of appeals agreed that "the facts would have to be stretched" to support petitioners' theory. Pet. App. 18a. The court explained (*id.* at 19a n.8) that under *Feres* v. *United States*, 340 U.S. 135 (1950), the government is protected from tort liability for injuries to members of the armed services arising out of their military service. Under *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977), that protection extends to suits for indemnity by government contractors who manufacture military equipment under specifications supplied by the government, because allowing indirect recovery against the government would undermine *Feres*' prohibition of direct suits by service members. For the same reason, the court found it "difficult to envision the circumstances under which a court could find an implied-in-fact agreement on the part of the government to provide the kind of indemnity for which [petitioners] argue." Pet. App. 19a n.8. There is no reason for this Court to question the conclusion that petitioners' implied indemnity claim is too implausible to present a genuine issue of fact for trial.[9]

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[9] Even express agreements to indemnify a government contractor for open-ended liabilities are extraordinary, and in the absence of some specific statutory provision it is questionable whether government agents would have had the authority to agree to the indemnity suggested by petitioners. Compare, *e.g.*, 42 U.S.C. 2210(d) and (h) (indemnification of nuclear contractors); 42 U.S.C. 9619 (President "may agree to hold

b. Even if petitioners' implied indemnity claim raised a triable issue of fact, the Claims Court correctly concluded (Pet. App. 64a-65a, 96a-97a) that under the facts of this case petitioners would not be able to show any breach by the government of an underlying warranty of specifications. As the court pointed out, despite the "many and varied decisions regarding the veterans' suits against the herbicide manufacturers" (*id.* at 65a, 97a), no court has ever found credible evidence that exposure to Agent Orange caused any of the injuries complained of by the individual tort plaintiffs.

Chief Judge Weinstein, who expressed considerable sympathy for the veteran plaintiffs (see, *e.g.*, *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 857 (E.D.N.Y. 1984)), nonetheless approved settlement of their claims in part because he thought the case probably "without merit," *ibid.*, in view of the fact that "an enormous scientific effort to be helpful on causation ha[d], from the plaintiffs' point of view, left the case at best open." *Id.* at 795. In later granting summary judgment against those plaintiffs who opted out of the settlement, the Chief Judge explained that "years of discovery and tens of millions of dollars spent by the government and

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harmless and indemnify" certain "response action contractor[s]" under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)); and 50 U.S.C. 1431 (President may enter into defense contracts during emergencies without regard to most normal statutory restrictions) with, *e.g.*, the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(B) (no officer or employee may commit the government to any "contract or obligation for the payment of money before an appropriation is made unless authorized by law").

others on research ha[d] not yielded any competent evidence indicating a genuine issue of fact about causation." *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1260 (E.D.N.Y. 1985). That judgment was echoed twice by the court of appeals. *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 171-173 (2d Cir. 1987) (opinion approving settlement), cert. denied, 484 U.S. 1004 (1988); 818 F.2d 187, 193-194 (opinion approving dismissal of "opt-out" plaintiffs' claims) (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988). And time has produced no new evidence that would call the courts' conclusion into question. See *Ivy* v. *Diamond Shamrock Chemicals Co. (In re "Agent Orange" Product Liability Litigation)*, 996 F.2d 1425, 1436-1437 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994) (reviewing recent evidence and refusing to reopen settlement). There is no reason for this Court to question the Claims Court's decision (Pet. App. 68a), and the court of appeals' suggestion (*id.* at 18a), that petitioners' allegation of breach of warranty in this case raised no genuine issue for trial.

c. Finally, both the Claims Court (Pet. App. 67a-78a, 99a-100a, 104a-115a) and the court of appeals (*id.* at 19a-25a) held that petitioners could not "prove that [any] damages were caused by the government's alleged breach of an implied warranty of specifications because they were protected from liability to the Agent Orange plaintiffs by the government contractor defense." *Id.* at 19a-20a.

As the court of appeals pointed out (Pet. App. 22a), the courts that considered the Agent Orange tort litigation all ultimately concluded that the government contractor defense protected petitioners from

liability. The district court initially granted summary judgment for petitioners on the basis of that defense. See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 796 (E.D.N.Y. 1980) (Pratt, J.) (indicating willingness to invoke defense once elements proved); *In re "Agent Orange" Product Liability Litigation*, 565 F. Supp. 1263, 1272-1274 (E.D.N.Y. 1983) (granting motions for summary judgment). Chief Judge Weinstein retracted that action after assuming responsibility for the case, see Pet. App. 7a, but he later discussed the potential applicability of the defense in approving the settlement agreement, see 597 F. Supp. at 795-799, 843-850, and he relied on its applicability in dismissing the claims of those plaintiffs who opted out of the settlement. 611 F. Supp. at 1263-1264 ("Plaintiffs are unable to overcome defendants' government contract defense."). The Second Circuit affirmed in each instance; indeed, it based its decision with respect to the opt-out plaintiffs solely on the government contractor defense. See 818 F.2d at 173-174 (settlement opinion) (defense a "final and in our view impossible, hurdle to surmount"); *id.* at 189-194 (opt-out opinion), 192 ("We need not define the precise contours of the defense because we believe that under any formulation * * * the defendants here were entitled to summary judgment."). See also *id.* at 209 (opinion on manufacturers' tort indemnity claims against the United States); *Ivy* v. *Diamond Shamrock Chemicals Co.*, 996 F.2d at 1436. The long history of prior litigation provides solid support for the conclusion of the court below that "there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed against [petitioners]." Pet. App. 23a.

That conclusion is also logically compelled by the parallel requirements of the government contractor defense and the warranty-of-specifications theory advanced by petitioners in this case. Petitioners' proposed warranty theory requires them to establish that they manufactured Agent Orange in compliance with precise design specifications devised and drafted by the government, and that the government knew more than they did about the part of the design that caused the alleged defect in the resulting product. Pet. 12. By comparison, the government contractor defense applies whenever the United States approved reasonably precise specifications, the contractor's work conformed to those specifications, and the contractor warned the United States about any hazards known to the contractor but not to the United States. Pet. App. 21a-22a, citing *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 512 (1988).

Because the elements required to recover under the alleged warranty and those required to invoke the government contractor defense are essentially the same, if a contractor can establish the grounds for the existence of a warranty of specifications under petitioners' theory, it will necessarily have established the elements of a complete defense to any tort claim that might give rise to damages under the warranty. Conversely, if a tort plaintiff suing a contractor succeeds in recovering damages despite invocation of the government contractor defense, then whatever element of that defense the contractor failed to establish will also preclude it from recovering under any purported warranty. See also *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 204, 208-209 (2d Cir. 1987) (applying similar analysis to petitioners' tort indemnity claim against the United States).

Petitioners argue (Pet. 13-16) that although they settled the underlying tort litigation, rather than relying on the government contractor defense to preclude liability, they are entitled to recover for breach of an alleged warranty of specifications because their settlement was "reasonable" (Pet. 14). That argument reflects a misunderstanding of the structure of government contract law, which offers different protections to contractors in different situations. In *Spearin*, the contractor could be protected only by allowing recovery of additional costs and lost profits related to completion of the contract. In this case, if petitioners followed government design specifications and did not withhold information about potential hazards unknown to the government, their full protection lay in the government contractor defense. Nothing in *Spearin* supports the conclusion that the United States implicitly warranted to reimburse petitioners for costs involved in litigating and settling tort suits as to which the law already provided a complete defense. And no such result can fairly be inferred from the terms of routine supply contracts like those at issue here.

Petitioners' theory would cede to government contractors the power to create indirect governmental liability to tort plaintiffs, allowing such plaintiffs to accomplish by suing the contractor what they could not accomplish by suing the government directly. It would also encourage military contractors to settle meritless product liability suits and then seek to recover the related costs through breach of contract claims against the United States.

At bottom, petitioners' argument may be that the United States should be liable in contract because

petitioners' agreement to settle the class action was not truly voluntary, petitioners having been pressured by Chief Judge Weinstein's refusal to enter final judgment on the original order granting summary judgment, and his subsequent encouragement of settlement. But such a settlement cannot establish government liability where none otherwise exists—particularly where the courts eventually determined not only that there was no defect in the Agent Orange specifications, but also that the government contractor defense immunized petitioners from suit.[10]

Finally, even petitioners' own authorities hold that an implied indemnity will not always cover a settlement based on nothing more than potential liability. For instance, a showing of *actual* liability will be

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[10] Petitioners also contend (Pet. 16-17) that this case merits review because suppliers will either raise their prices or withdraw from competition for government contracts because third-party tort liability costs "will no longer be recoverable in contract from the United States." But those costs have never been recoverable against the government, in contract or otherwise. As this Court has explicitly recognized, contractors have long been on notice that they should take any risk of tort liability into account in negotiating government contracts, because of the government's immunity from tort-law contribution. *Stencel Aero Eng'g Corp.*, 431 U.S. at 674 & n.8. They can hardly claim surprise that the same principles apply to preclude novel claims of liability under implied contractual indemnities. A contractor's risk of tort liability is controlled instead through precisely the mechanism at issue here, the government contractor defense. That defense is carefully calibrated to shield suppliers who follow government design specifications in good faith, without destroying their incentive to develop and share with the government information relating to risks or hazards inherent in the government's designs. See generally *Boyle*, 487 U.S. at 511-513.

required when the "theory on which the original plaintiff had proceeded appeared questionable as a basis for liability." *Parfait* v. *Jahncke Service, Inc.*, 484 F.2d 296, 304-305 (5th Cir. 1973) (discussing *Whisenant* v. *Brewster-Bartle Offshore Co.*, 446 F.2d 394, 401-403 (5th Cir. 1971)), cert. denied, 415 U.S. 957 (1974); see also *Tankrederiet Gefion A/S* v. *Hyman-Michaels Co.*, 406 F.2d 1039, 1042 (6th Cir. 1969) (adopting "general rule" requiring showing of actual liability). The courts below carefully considered the facts of this case, the various doctrines at issue, and the course of proceedings in the previous tort actions. They determined that, even if petitioners' contracts with the government included an implied indemnity for third-party tort damages, the chances that petitioners faced actual liability in that action were not only "questionable," but were so remote that petitioners' claim of indemnifiable damages did not present a triable issue of fact. See Pet. App. 18a-23a, 64a-78a, 96a-100a, 104a-115a. That fact-bound conclusion necessarily implies that petitioners' settlement could not have been "reasonable" within the meaning of the indemnity rules they cite, and it merits no further review by this Court.

2. Petitioners contend (Pet. 19-22) that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, and the government's "compulsion" of petitioners' Agent Orange production under the DPA, together "create an implied-in-fact agreement to indemnify petitioners for the damages they suffered in the Agent Orange litigation." [11] Petitioner Hercules did

[11] We note that the nature or extent of the government's "compulsion" is by no means settled, particularly with respect to petitioner Hercules. See Pet. App. 3a-4a; compare *id.* at

not advance that claim either in the Court of Federal Claims or in the court of appeals, and it is properly before this Court only on behalf of petitioner Thompson. See Pet. App. 14a-15a, 28a. The court of appeals correctly rejected Thompson's argument. Pet. App. 28a-33a.

a. As the court of appeals held (Pet. App. 29a-33a), the language and statutory context of Section 707 indicate that it protects contractors from claims arising out of a DPA order's displacement of work for other customers, not from tort liability to third parties who claim to have been injured by products manufactured for the government. Section 101(a)(1) of the DPA, 50 U.S.C. App. 2071(a)(1) (emphasis added), authorizes the President

> to require that performance under [defense] contracts or orders * * * shall take *priority over* performance under any other contract or order, and, *for the purpose of assuring such priority*, to require acceptance and performance of such contracts or orders *in preference to other contracts or orders* by any person he finds to be capable of their performance.

Section 707 (50 U.S.C. App. 2157) complements that core directive by providing further that:

> No person shall be held liable for damages or penalties for any act or failure to act resulting

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49a-50a with *id.* at 84a-85a; see also C.A. App. 670-677; *United States v. Vertac Chemical Corp.*, Nos. 94-1946 etc. (8th Cir. Jan. 31, 1995), slip op. 3 ("In 1964 * * * Hercules submitted and won competitive bids to supply the United States with * * * Agent Orange."). Because the case was resolved on summary judgment, we must accept petitioners' allegations of compulsion as true for present purposes.

> directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act * * *, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned * * * under any rule, regulation, or order * * * by charging higher prices * * * or in any other manner.

Construing the two provisions together, the court of appeals properly concluded that Congress did not intend Section 707 of the Act to confer an immunity broader than the risk imposed by Section 101. And, as the court explained (Pet. App. 31a), while that risk may include the need to break or delay performance under contracts with third parties in order to give preference to a government order, "it does not include the risk that the product produced under the DPA contract will be inherently unsafe to users." [12] Every other court that has considered the issue has reached the same conclusion. See *id.* at 100a-102a (Court of Federal Claims); *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. at 843-845 (opinion approving settlement); see also *United States* v. *Vertac Chemical Corp.*, Nos. 94-1946 etc. (8th Cir. Jan. 31, 1995), slip op. 16-17 (citing decision below and hold-

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[12] As the court pointed out (Pet. App. 32a), the second sentence of Section 707, which refers specifically to contracts assigned priority under Section 101, supports the court's reading of the shield provision. The court did not address the significance of the first sentence's "notwithstanding" clause, which might suggest an even more limited construction.

ing that Section 707 confers no immunity from liability under CERCLA).

b. Even if Section 707 should have shielded petitioners from tort liability for their production of Agent Orange, petitioner Thompson's argument (Pet. 20) that the statute evinces an "implied-in-fact agreement" to *indemnify* it for such liability is implausible. Whatever its scope, Section 707 is plainly intended to provide a defense to liability in third-party lawsuits against a DPA contractor, not to provide the supplier with a breach of contract action against the United States. It was therefore plausible for petitioners to advance their Section 707 claim as a defense to liability in the class action litigation: the DPA shield provision would have functioned, on petitioners' interpretation, like a somewhat more absolute version of the government contractor defense. Petitioners failed to persuade the district court in that action (see 597 F. Supp. at 843-845), however, and in the end they compromised the action. Petitioner Thompson cannot now prevail on the much more remarkable claim that Congress, having provided (in Thompson's view) a complete and explicit shield from tort liability in Section 707, also agreed, *by implication*, to indemnify Thompson fully if it chose instead to settle the plaintiffs' claims. As the court of appeals observed (Pet. App. 32a-33a), "if Congress had intended section 707 to impose upon the government the kind of liability asserted by Thompson, it would have said so in clear and unequivocal terms." [13]

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[13] In addition, as the Claims Court noted (Pet. App. 102a-103a), even if such an agreement to indemnify could be inferred, it would probably violate the Anti-Deficiency Act, 31 U.S.C. 1341. See note 9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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HERCULES INCORPORATED

and

WM. T. THOMPSON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONERS' REPLY BRIEF

INTRODUCTION

From the moment petitioners were ordered to produce Agent Orange subject to the enforcement provisions of the Defense Production Act, the damages suffered by these manufacturers were inescapable. While the government would like to pretend otherwise, the following facts must be accepted as true at this stage in the litigation:

(1) pursuant to its authority under the Defense Production Act, the government compelled petitioners Wm. T. Thomspon Company ("Thompson") and Hercules Incorporated ("Hercules") to manu-

facture Agent Orange in accordance with specifications devised by the government;

(2) the government, but not petitioners, knew that Agent Orange manufactured according to the government's specifications was potentially dangerous;

(3) the government's use of Agent Orange in Vietnam led to petitioners being sued in tort by a class of individuals allegedly harmed by exposure to Agent Orange;

(4) Thompson and Hercules entered into a reasonable settlement of these tort claims on the eve of a trial where they faced enormous potential liability, and did so only after petitioners had attempted without success to have the case dismissed prior to trial on the basis of what eventually came to be known as the government contractor defense; and

(5) had Thompson and Hercules followed the course suggested by the government, rejected settlement and faced enormous potential liability at trial, the *best* that could have occurred was that liability to the Agent Orange class would have been avoided, but the companies still would have faced legal fees of a magnitude comparable to the amounts that petitioners paid out in settlement.

On this set of facts, the court of appeals held that, as a matter of law, petitioners had no remedy against the government.

Two issues arising from the court of appeals' ruling are the subject of this petition: first, whether the government can use the government contractor defense to *tort claims* to bar *breach of contract claims* against the United States that otherwise would be permissible under *United States v. Spearin*, 248 U.S. 132 (1918); and, second, whether the plain language of the Defense Production Act requires the United States to reimburse petitioners for the damages they suffered as a consequence of being compelled to manufacture Agent Orange. The government's opposition

to the petition consists largely of arguments for disposing of petitioners' contract claims on alternative grounds, grounds upon which the court of appeals expressly declined to rely. To the extent that the government defends the court of appeals' actual resolution of the first issue posed above, the government's argument actually supports granting the petition. The government's argument on the second issue is a *non sequitur* and provides no reasoned basis for opposing the petition.

In contrast, petitioners have already demonstrated the generalized importance of having these two issues decided by this Court. Indeed, the need for this Court's review in this case has now been seconded by the United States Chamber of Commerce which has filed an *amicus* brief urging that the petition be granted.

THE *SPEARIN* CLAIM

The court of appeals rested its rejection of the *Spearin* contractual warranty claim asserted by Hercules and Thompson on one ground and one ground only: because Hercules and Thompson settled with the Agent Orange class on the eve of trial instead of continuing to litigate, Hercules and Thompson "volunteered" to suffer the damages which inevitably flowed from the government's conscription of their manufacturing facilities. In their petition to this Court, Hercules and Thompson demonstrated that certiorari should be granted because this ruling by the court of appeals conflicts with established contract principles and important policy considerations, and will create unnecessary confusion and uncertainty through its application of tort law concepts and policies to the arena of government contracting.

In opposing the petition, the government itself finds little that is defensible in the holding of the court of appeals. Instead, the government seeks to rely on alternative grounds to dispose of petitioners' *Spearin* claim, grounds which the court of appeals *expressly declined* to

rely on as a basis for its decision.[1] It is wholly inappropriate for the government to urge that review be denied in this case on grounds the court of appeals rejected. The United States urged the causation theory which the court of appeals adopted below and the United States should defend that holding now.

What little the government does say in defense of the court of appeals' actual ruling on the *Spearin* claim bolsters the case for granting the petition. The government's argument highlights the split in the circuits as to whether "actual liability" to third parties must be demonstrated before recovery may be had on a breach of warranty claim, or whether "potential liability" is sufficient.

The government contends that the court of appeals' resolution of the *Spearin* claim could be upheld on the grounds that such a claim would require not merely a showing of "potential liability" to the third-party tort plaintiffs as petitioners urge, but would necessitate a demonstration of "*actual* liability" in tort to the Agent Orange plaintiffs. Op. Cert. at pp. 19-20 (emphasis in original). In making this argument, the government cites to *Tankrederiet Gefion A/S v. Hyman-Michaels Co.*, 406

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[1] For example, the government argues that "there is no reason for this Court to question the conclusion that petitioners' implied indemnity claim is too implausible to present a genuine issue of fact for trial." Op. Cert. at 13. However, no such "conclusion" is to be found anywhere in the court of appeals' decision. Similarly misplaced is the government's attempts to argue against the grant of *certiorari* on the basis that petitioners would not be able to prove a breach of warranty because there is no "credible evidence" that Agent Orange actually injured the tort plaintiffs in the Agent Orange litigation. Op. Cert. at 14-15. In the first place, proof of actual injury to the Agent Orange plaintiffs (as opposed to proof of injury to Hercules and Thompson) is completely irrelevant to the elements of petitioners' breach of warranty claims as urged in this Court because there was a judicial finding that there was sufficient exposure to make settlement reasonable. In any event, this was *not* the basis of the court of appeals' decision, nor could it be in the posture in which the case was decided.

F.2d 1039, 1042 (6th Cir. 1969), as adopting a "general rule" requiring a showing of actual liability. What the government flatly ignores is that at least one other circuit has rejected this approach and has held that potential liability is sufficient, even where a jury subsequently makes findings which establish that no actual liability existed. *Damanti v. a/s Inger*, 314 F.2d 395 (2d Cir. 1963), *cert. denied*, 375 U.S. 834 (1963). The existence of this split in the circuits on this fundamental question of third party liability when applied in the government contracts context is a powerful reason for this court to grant the petition.[2]

Most of what remains of the government's argument in support of the court of appeals' resolution of the *Spearin* claim consists of an effort to demonstrate that the underlying settlement in the Agent Orange litigation was not reasonable. Indeed, the government goes so far as to make the conclusory pronouncement that "petitioners' settlement could not have been 'reasonable.'" Op. Cert. at 20. Such a contention flies in the face of the government's admissions that the government contractor defense is "factual" in nature and that the government actively opposed petitioners' efforts to rely on this defense in the Agent Orange litigation. Op. Cert. at p. 4, note 2.

While it is true that, without the benefits of any fact finding, the Federal Circuit impliedly held that the Agent

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[2] The government also argues that the theory underlying petitioners' *Spearin* claims would "cede to government contractors the power to create indirect governmental liability to tort plaintiffs," and would "encourage military contractors to settle meritless product liability suits and then seek to recover the related costs through breach of contract claims." Op. Cert. at p. 18. While this argument merely begs the larger question as to who should pay for the costs that undeniably were associated with the compelled production of Agent Orange, it does serve to illustrate the important ramifications of how that question ultimately is answered. In point of fact, the Court of Appeals' interpretation of the *Spearin* doctrine results in a radical restructuring of the relationship between the government and its contractors which warrants the attention of this Court.

Orange settlement was unreasonable, this only exposes the fundamental error in the decision below. In particular, the Agent Orange settlement *already* has been declared reasonable and that finding is not subject to attack in petitioners' suit for breach of warranty. Judge Weinstein issued a 159-page opinion assessing the reasonableness of the settlement. *In Re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984). He concluded as follows:

> *From the defendants' point of view the settlement is reasonable*: First, defending the case would have cost more tens of millions of dollars in legal fees and expenses plus the time of employees and executives who could be doing more productive work. Second, though slight, there was a possibility of an ultimate liability with claims totalling billions of dollars. Third, an ongoing emotional trial would have created adverse publicity (whether or not unfair), perhaps causing a spillover effect against defendants' other products. Fourth, continued litigation and the possibility of an adverse result has a negative influence on the financial community, causing greater financing expenses as the companies become less attractive to investors.

Id. at 857.

The Agent Orange settlement was also approved as reasonable at the appellate level in *In Re "Agent Orange" Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987):

> [G]iven the serious nature of many of the various ailments and birth defects plaintiffs' attributed to Agent Orange, the understandable sympathy a jury would have for the particular plaintiffs, and the large number of claimants, 240,000 . . . [the manufacturers of Agent Orange] were exposed potentially to billions of dollars in damages if liability was established and millions in attorneys' fees merely to continue the litigation . . . tort law accords juries wide

> discretion, and the existence of any substantial number of serious plaintiffs would create a dangerous exposure for the chemical companies.

Id. at 151.

Finally, the government contends that the elements of the government contractor defense and the *Spearin* claim are co-extensive, and argues that if petitioners are able to meet their burden under *Spearin* here, then they could have met the terms of the defense in the underlying tort case. The government's fascile logic disguises what is in reality yet another attempt to challenge the reasonableness of the underlying settlement in the Agent Orange litigation. Moreover, while the government argues that the government contract defense and the *Spearin* claim are "carefully calibrated" to protect innocent suppliers (Op. Cert. at 19 n.10), there exists no exposition by this Court of that calibration.[8] The question is how to apportion liability when an innocent contractor is injured as a result of the government's actions in compelling production of a potentially dangerous product. Given the interests at the heart of these doctrines, the answer should be an inquiry into fault. Where the fault is the United States', then liability should rest there as well.

THE DEFENSE PRODUCTION ACT CLAIM

The Defense Production Act ("DPA" or "Act"), under whose authority Hercules and Thompson were compelled to manufacture Agent Orange, contains a hold harmless provision indemnifying manufacturers from liability "for damages or penalties for any act . . . resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . ." DPA Section 707, 50 U.S.C. § 2157. The plain language of Section 707

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[8] Moreover, this "careful calibration" certainly did not exist in 1984 when the Agent Orange litigation was settled; it could not and did not work in this case, leaving petitioners with liability so significant that it forced Thompson out of business.

creates a *quid pro quo* immunizing manufacturers from liability for the conduct they are compelled to perform under the Act. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America, at p. 9.

The government's approach to the analysis is to repeat the court of appeals' conclusion that "Congress did not intend Section 707 of the Act to confer an immunity broader than the risk imposed by Section 101." Op. Cert. at 22. This response merely begs the question; petitioners do not seek an immunity broader than that clearly granted by the Act. What is pointedly ignored by the United States and the court of appeals is that the authority under Section 101 directed at Hercules and Thompson was the ability to compel acceptance and performance. The issue is whether damages arising from compelled performance are covered by the hold harmless provision of the Act. The government's answer is to avoid the plain language of the Act by italicizing language authorizing the United States to compel priority,[4] thus directing the Court's attention away from the language relevant to this case which authorizes the United States to compel acceptance and performance of a contract.

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[4] The government's statutory construction is so unique it actually supports petitioners' request that *certiorari* be granted. The government represents that the second sentence of Section 707 "refers specifically to contracts assigned priority under section 101, [which] supports the court's reading of the shield provision." Op. Cert. at 22 n.12. No rule of statutory construction allows the sweeping language of the first sentence to be limited by specifics which follow. *See* dissenting opinion of Judge Plager, App. 44a-45a.

The United States also suggests that the "notwithstanding" clause in the first sentence of Section 707 creates "an even more limited construction." Op. Cert. at 22 n.12. This language reveals quite the opposite, as this clause confers immunities: "notwithstanding that any such rule, regulation or order shall thereafter be declared by judicial or other competent authority to be invalid." The scope of this hold harmless provision is so sweeping that even damages arising from orders held invalid are subject to the protections of Section 707. *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976).

The language of the DPA is extremely clear that the scope of damages sought to be protected is all-inclusive. Congress sought to protect manufacturers compelled to perform contracts in emphatic language that "[n]o person shall be held liable" for damages resulting "directly or indirectly" from such compulsion. 50 U.S.C. § 2157. Where compulsion is used to require a private manufacturer to turn production facilities to Government use, Congress clearly intended that no harm befall the company as a result. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America, at p. 10. That is not the case here.[5]

The United States questions whether the indemnity provisions of the DPA could lead to an implied-in-fact agreement to indemnify.[6] Petitioner argued below the Govern-

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[5] The clear breadth of this proscription against liability also provides support for petitioners' *Spearin* argument. Where the government contractor defense and the *Spearin* claim act in concert, an innocent manufacturer should be protected. Where they fail to act in concert, as happened in the underlying case here, the question arises as to whether the United States or the manufacturer should bear the liability. Petitioners argue above that fault should provide the answer. Congressional intent in enacting the DPA also supports the government's liability in this case.

[6] The United States also argues that even were the scope of the Act to be seen as providing indemnity to petitioners, the Anti-Deficiency Act would prohibit such a finding. The purpose of the Anti-Deficiency Act is to keep an agent or officer of the Government from binding the United States to a contractual provision which would create a liability which is open-ended or otherwise in excess of what Congress appropriated for the matter. *California-Pacific Utilities Co.*, 194 Ct. Cl. at 720. If the contract officer had written an indemnity provision under which petitioners now have brought an action, then the Anti-Deficiency Act might apply. An implied-in-fact indemnity, just as an implied-in-fact warranty, is a judicially fashioned remedy which acknowledges the context in which a contract arose. As such, it stems from the powers of the court rather than from a contract officer. The courts, therefore, have authority to enforce such an indemnity without being subject to the Anti-Deficiency Act. *See Lopez v. A.C. & S., Inc.*, 858 F.2d

ment's 1) compulsion, 2) control over both specifications and production, 3) prohibition against labeling and warning, 4) the "hold harmless" provision of the Defense Production Act, 50 U.S.C. § 2157, under which the compulsion was brought, and 5) use of a manufacturer to its detriment create a factual context which gives rise to an implied-in-fact agreement to indemnify. As noted in *Space Age Engineering, Inc. v. United States*, 4 Cl. Ct. 739, 742 (1984):

> This court cannot redress the violation of a statute or regulation which creates no enforceable rights, (*citations omitted*), but a plaintiff may rely on the violation of a statute or regulation to show its implied contract for fair consideration has been breached. *Dynalectron Corp. v. United States*, 4 Cl. Ct. 424, 428 (1984); *see also Alabama Metal Products, Inc. v. United States*, 4 Cl. Ct. 530, 534 (1984); *Electro-Methods, Inc. v. United States*, 3 Cl. Ct. 500, 508 (1983), *aff'd in part*, 728 F.2d 1471 at 1475 (Fed. Cir. 1984).

In sum, the government provides no reason why this Court should not determine the breadth of the immunity conferred under the Defense Production Act.

CONCLUSION

For the foregoing reasons, and those stated in both the petition and amicus brief filed by the U.S. Chamber of Commerce, the petition for a writ of certiorari should be granted.

712, 716 (Fed. Cir. 1988), *cert. denied sub nom, Eagle-Picher Industries v. United States, 491 U.S. 904 (1989).* Additionally, were Deficiency Act held to apply, indemnification would not be barred because of exceptions for hazardous activities and for compelled production. *See Matter of Assumption by Government of Contractor Liability to Third Persons-Reconsideration*, 62 Comp. Gen. 361 at 365.

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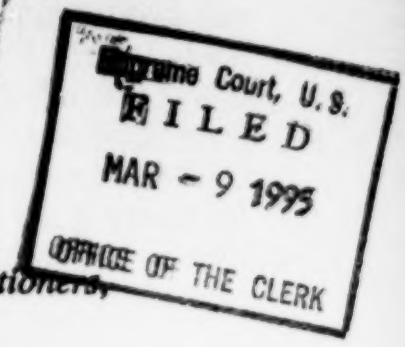
No. 94-818

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994



HERCULES INCORPORATED
and
WM. T. THOMPSON COMPANY,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 707 of the Defense Production Act of 1950 (the "DPA"), 50 U.S.C. app. § 2157, which mandates that a contractor shall not be liable for "damages . . . for any act or failure to act" resulting from compliance with orders under that Act, shields government contractors from damages incurred as a result of mandatory work ordered to be performed by the government.

2. Whether the Federal Circuit's limited view of the indemnification provided by Section 707 is fundamentally inconsistent with the government contractor defense created by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which protects government contractors from third-party tort claims, and the protections afforded in *United States v. Spearin*, 248 U.S. 132 (1918), which also protects contractors from the results of faulty government specifications.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

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HERCULES INCORPORATED

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federal association of businesses, companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 215,000 businesses and organizations. It is the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States. The Chamber seeks to advance those interests by filing briefs in cases of importance to the business community. Among the Chamber's constituencies is a core of businesses which contract with the United States.

The decision of the United States Court of Appeals for the Federal Circuit in the instant case has serious adverse

implications for large and small corporations alike. The decision below is of great concern to the Chamber's members in that it allows the government to escape liability for the consequences of its actions in entering into mandatory contracts for hazardous materials which are critical to the implementation of important public policy goals, and thrusts upon private parties the costs of its actions. The Chamber believes it is important for this Court to recognize the significance of this issue to the business community.

Permitting government-caused tort liability to be imposed on government contractors raises serious legal and constitutional concerns, since this liability is neither bargained for nor avoidable by government contractors. In the Chamber's view, such liability is wholly inconsistent with existing doctrines protecting government contractors from contractual and third party tort liability for actions dictated by the government through mandatory contracts. It is also inconsistent with the expressed will of Congress embodied in Section 707 of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2171 ("DPA"). Because the Federal Circuit's interpretation and application of contract law and the government contractor defense issue are in conflict with applicable decisions of this Court, the Court should grant the petition for a writ of certiorari.[1]

SUMMARY OF ARGUMENT

1. The history of the DPA illustrates that Congress intended to indemnify contractors for the consequences of producing material for use in defense of the nation. Section 707 of the DPA indemnifies the Petitioners for the consequences of contracts entered into pursuant to the DPA, including damages in tort.

2. The Federal Circuit's misapplication of Section 707 is wholly inconsistent with the government contractor defense enunciated by this Court in *Boyle v. United Tech-*

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[1] The petitioners and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

nologies Corp., 487 U.S. 500 (1988), which shields government contractors from third party tort liability for work performed pursuant to government contract specifications, and the doctrine of *United States v. Spearin*, 248 U.S. 132 (1918), which likewise protects government contractors from the effects of faulty or harmful government contract specifications.

REASONS FOR GRANTING THE WRIT

The petition at bar concerns the protections afforded to government contractors performing important though sometimes hazardous public policy goals. Concomitantly, the petition concerns the extent to which the federal government can avoid liability for contracts which it has imposed upon private entities. The protections afforded to government contractors are broader than the limited and internally inconsistent view of government contract indemnity adopted by the Federal Circuit.

The decision below would allow the government to escape the consequences of having compelled petitioners to produce a material, Agent Orange, that the government knew was potentially hazardous, and then knowingly exposing service personnel to that material.

While it is well-settled after this Court's determination in *Spearin* that the government warrants the specifications which it imposes in contracts, the Federal Circuit found that *Spearin* did not extend to indemnify the petitioners for the tort claims against it, and that Section 707 protected the contractor only from additional costs or delays imposed by government contract, not from the risk of injury to third parties caused by use of dangerous government specifications. The Federal Circuit then compounded this error by asserting that the petitioners "voluntarily" failed to invoke the government contract defense. None of these decisions will survive scrutiny.

In sum, this case involves the misapplication of three protections that should work integrally to shield from liability government contractors doing the government's work. *Boyle*, which shields government contractors from third party tort claims, *Spearin*, which protects contractors

from defective government specifications, and the DPA, which mandates that a contractor shall not be liable for "damages . . . for any act or failure to act" resulting from compliance with orders under that Act, all have similar tests and similar justifications. The Federal Circuit failed to address the integral nature of these defenses, limited protection under the DPA, and, at the urging of the government, held that the DPA provides no protection to the petitioners.

I. THE DEFENSE PRODUCTION ACT INDEMNIFIES THE PETITIONERS

Claiming to read the plain language of the DPA and to harmonize Sections 101 and 707 of the DPA, the Federal Circuit stated that Section 707 did not indemnify contractors for tort liability. The lower court cited no direct authority for its view that Section 707 does not extend such protection to contractors, and its view is in conflict with the text and the history of the DPA.

A. History of the Defense Production Act

1. *Historical Development*

Grants of immunity and indemnity against third party liability by the United States to its contractors are permitted by the authority conferred in the Constitution to enter into contracts[2] and to exercise "war powers."[3] When these two powers have fused, it has been necessary to protect those who contract with the government for defense-related goods from the consequences of the government's exercise of its political policy responsibilities,[4] particularly when the government has compelled production to meet war efforts.

Since before the First World War, Congress found it necessary to authorize the executive branch to compel production of goods. Congress recognized that contrac-

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[2] *Dugan v. United States*, 16 U.S. (3 Wheat.) 172 (1818).

[3] *Lichter v. United States*, 334 U.S. 742 (1948).

[4] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

tors must be immunized or indemnified from liability which might grow out of less-than-voluntary contract performance.[5] Indeed, Congress has on other occasions also recognized the need to indemnify contractors facing performance risks. *See, e.g.*, 10 U.S.C. § 2354 (1988) (providing indemnification for contracts involving hazardous activities).

During the World War I era, Congress granted certain extraordinary powers to the President to facilitate military mobilization. The National Defense Act of 1916 empowered the President in time of war or imminent war to place orders for products and materials required by the Army.[6] A similar act supported Navy procurement.[7] Compliance with these acts took precedence over any other contract. Neither act protected contractors from third-party liability.[8] Both acts required only that the United States pay just compensation to contractors for the goods conscripted.

2. *World War II*

The powers granted to the President during World War I expired at the cessation of hostilities. Thus, in 1940, when the situation in Europe required that the United States again mobilize for war, the President's special procurement powers were limited.

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[5] Pedrick & Springfield, *War Measures and Contract Liability*, 20 Tex. L. Rev. 71 (1949); Brown, *The Effect of Conscription of Industry on Contracts for the Sale of Goods*, 90 U. Pa. L. Rev. 533 (1942).

[6] National Defense Act of 1916, ch. 134, § 120, 39 Stat. 166, 213.

[7] Act of March 4, 1917, ch. 180, 39 Stat. 1168, 1192, *re-enacted by* Act of July 1, 1918, ch. 114, 40 Stat. 704, 719-20.

[8] Some courts recognized that compliance with a compulsory order under the National Defense Act of 1916 excused the breach of a commercial contract; the concept applied in these cases was simply that the acts of the sovereign frustrated performance of the contract. *See Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 F. 177 (2d Cir.), *cert. denied*, 253 U.S. 498 (1920).

The National Defense Act of 1940 empowered the President, for two years, to require that contractors give priority to Army and Navy contracts or orders,[9] and was later amended to give the executive authority to require contractors to give priority to orders for materials to be sent to a country deemed vital to the defense of the United States.[10] Congress also expressly immunized contractors from liability for breach of contract damages resulting from the performance of priority orders.[11] The Selective Training and Service Act of 1940[12] gave the President authority to order necessary supplies or equipment for the Army or Navy.[13]

Following the bombing of Pearl Harbor, Congress enacted the First and Second War Powers Acts. The First War Powers Act authorized the President, when necessary to "facilitate the prosecution of the war," to permit an agency exercising functions "in connection with the prosecution of the war effort . . . to enter into contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts" and regardless of the availability of appropriations.[14] The War Department relied on this broad grant of authority to assist contractors suffering financial losses

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[9] National Defense Act of 1940, ch. 440, § 2, 54 Stat. 676, 676.

[10] Act of May 31, 1941, ch. 157, 55 Stat. 236.

[11] *Id.* The legislative history of this provision recognized that manufacturers sued for damages had limited defenses to defaulted contracts, and "g[a]ve clear statutory protection to all manufacturers who comply with priority orders." H.R. Rep. No. 460, 77th Cong., 1st Sess. 6 (1941).

[12] Selective Training and Service Act of 1940, ch. 720, § 9, 54 Stat. 885, 892.

[13] *Id.* The authority conferred on the President by the Selective Training and Service Act of 1940 was identical to that of the National Defense Act of 1916.

[14] First War Powers Act, 1941, ch. 593, § 201, 55 Stat. 838, 839.

and to indemnify contractors against damages arising from the government contract.

The Second War Powers Act[15] again expanded the executive's power over defense contractors by giving the President authority to require *acceptance* of priority contracts or orders.[16] A contractor who refused to accept a contract or order faced criminal sanctions.[17] The Act expressly immunized contractors from liability for breach of contract.[18]

The Second War Powers Act and the Selective Training Service Act expired after World War II.[19] Concerned about the ability to meet the country's foreign and domestic obligations,[20] Congress enacted the Selective Service Act of 1948, which authorized the President to place orders for delivery of articles or materials required by the military forces or the Atomic Energy Commission.[21] A contractor receiving an order under the Act was required to give that order priority or face possible seizure of its plant and criminal sanctions.[22]

B. The Korean War and the Defense Production Act of 1950

The invasion of South Korea in 1950 thrust the United States into a military crisis which continued under the

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[15] Second War Powers Act of 1942, ch. 199, § 301, 56 Stat. 176, 177.

[16] *Id.*, 56 Stat. at 178.

[17] *Id.* at 179.

[18] *See L.N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694, 701 (2d Cir. 1949), *cert. denied*, 339 U.S. 914 (1950).

[19] Second War Powers Act of 1942, *as amended by* ch. 590, 59 Stat. 658 (1945); Selective Training and Service Act of 1940, *as amended by* Act of June 29, 1946, ch. 522, 60 Stat. 341.

[20] S. Rep. No. 1268, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. Serv. 1989.

[21] Selective Service Act of 1948, ch. 625, 62 Stat. 604, 625-26.

[22] *Id.*

penumbra of the "Cold War" until the fall of the Berlin Wall. In response, Congress drafted the Defense Production Act, which was generally derived from the emergency statutes enacted during World War II.[23]

Congress' principal purpose in drafting the DPA was to provide material to the military in as short a time as possible without total disruption of a free economy.[24]

DPA Section 101, 50 U.S.C. app. § 2071, once again gave the President extraordinary powers to compel acceptance and performance of contracts vital to the national defense.[25]

During World War II, when contractors had been compelled to perform military contracts or to take unusual risks, Congress indemnified war contractors, and immunized them against liability for commercial contract defaults. By 1950, however, government contractors had no such protection. This void was filled by Section 707, a new provision much more broadly immunizing contractors from "damages . . . for any act or failure to act resulting directly or indirectly from . . . compliance with . . . this Act."[26] The Senate report accompanying the DPA stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter." S. Rep. No. 2250, 81st Cong., 2d Sess. 11 (1950).

When Congress amended Section 707 for clarity in 1952, the Senate Report accompanying the amendment again described Section 707 in broad terms:

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[23] *See Defense Production Act of 1950: Hearings on S. 3936 Before the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess. 199-200, 278-92 (1950) (side-by-side comparisons of World War II statutory language with proposed statutory language).

[24] S. Rep. No. 2250, 81st Cong., 2d Sess. 1 (1950).

[25] Defense Production Act of 1950, ch. 932, § 101, 64 Stat. 798, 799.

[26] *Id.* § 707, 64 Stat. at 818.

> The first sentence of section 707 of the act contains the so-called exculpatory clause, which protects a person from liability, under contract or otherwise, as the result of compliance with the act or regulations issued under the act. This provision was included to encourage and assist people to comply with the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases.[27]

The authority to compel acceptance and performance of contracts or orders pursuant to Section 101 has not changed significantly since its original enactment. Likewise, the immunity afforded contractors under Section 707 performing in compliance with orders under the DPA has remained unchanged since 1952.

C. Section 707 Immunizes Contractors From Liability for Damages in Tort or Contract

By its plain language, Section 707 shields a contractor from liability for "damages . . . for any act or failure to act" resulting from compliance with the DPA.

In statutory construction cases, "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The lower court claimed to be reading this plain language when it denied recovery to the petitioners. Not so; it construed Section 707 in a manner that denies its plain meaning.

By its language, Section 707 immunizes a contractor from all liability resulting from compelled production, whether arising in contract, tort, or otherwise.

There is no indication that Section 707 was intended to excuse only liability under contractual defaults. Indeed, Congress rejected the explicit "liable . . . for any default under any contract" language of the predecessor in favor of the broader "liable . . . for any act or failure to act"

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[27] S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1789, 1818-19.

language of Section 707, providing powerful evidence to the contrary. Had Congress intended such a limitation it could very easily and simply have adopted the prior language.[28]

Second, the references to Section 707 in the DPA's legislative history are wholly consistent with the proposition that the immunity language applies to all damages or claims, whatever the legal basis. The House report stated: "This section [707] provides an exemption from damages or penalties which might result from compliance with rules, regulations, or orders issued under title I."[29] Similarly, the relevant Senate report stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter."[30] When Congress re-examined Section 707 in 1952, it stated that Section 707 "protects a person from liability, under contract *or otherwise*, as the result of compliance with the act or regulations issued under the act."[31]

In sum, the plain meaning of the provision, its legislative history, and the historical context in which it was enacted all demonstrate that Congress indeed intended Section 707 to immunize contractors from all damages resulting from compelled production.

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[28] *Compare* ch. 199, § 301, 56 Stat. at 180 *with* 50 U.S.C. app. § 2157. As previously noted, Congress has not hesitated to indemnify government contractors against the risks that result from government contract performance—even risks which the contractor's work may engender. *See* 10 U.S.C. § 2354 (1988) (providing indemnification for contracts involving hazardous activities); Atomic Energy Damages Act, 42 U.S.C. § 2014 (1988 & Supp. V 1993) (authorizing indemnification of government contractors from nuclear risks); *see also* 48 C.F.R. § 52.228-7 (1994). The Federal Circuit's view was certainly not premised on considerations of congressional policy.

[29] H.R. Rep. No. 2759, 81st Cong., 2d Sess. 22, *reprinted in* 1950 U.S.C.C.A.N. 3620, 3644.

[30] S. Rep. No. 2250, 81st Cong., 2d Sess. 11 (1950); *see* 96 Cong. Rec. 10,572 (1950).

[31] S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1789, 1818 (emphasis added).

II. THE FEDERAL CIRCUIT'S INTERPRETATION OF THE DPA IS WHOLLY INCONSISTENT WITH *BOYLE*'S GOVERNMENT CONTRACTOR DEFENSE AND WITH INDEMNIFICATION OF CONTRACTORS FOLLOWING GOVERNMENT SPECIFICATIONS IN *SPEARIN*

As stated previously, the other shields involved in this case are the government contractor defense set forth in *Boyle* and the warranty of adequate specifications elucidated in *Spearin*. Those defenses, which involve nearly identical elements, protect the government contractor from third-party tort claims and from liabilities incurred due to reliance on government contract specifications. Section 707, which also is geared to protecting government contractors performing mandated services for the government, should be construed similarly. When properly integrated, these three defenses provide freedom from third party tort liability, indemnification for reliance on government specifications, and, under the DPA, indemnification from all liabilities incurred as a result of the contract performance. The opinion of the Federal Circuit, however, diverted from the logic of this trio of government contractor protections to hold that the DPA will not indemnify contractors for incurred liabilities. *See Hercules, Inc. v. United States*, 24 F.3d 188, 204 (Fed. Cir. 1994). This decision is not only inconsistent with the DPA's text and history, but with *Boyle* and *Spearin*.

In *Boyle*, this Court held that a contractor manufacturing products for the government is not liable in tort to third parties if:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

487 U.S. at 512.[32] These three elements are simply approval, conformance, and relative knowledge.

The first two elements of the test tie the production of the product to the government's demands. "[A] product conforms to reasonably precise specifications if it satisfies an intended configuration even if it may produce unintended and unwanted results." *Kleeman v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989) (quotations omitted), *cert. denied*, 495 U.S. 953 (1990). The contractor satisfies the third element by proving the government knew of (or at least the contractor did not conceal) a danger. *Boyle*, 487 U.S. at 512; *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 951 n.10 (4th Cir. 1989).

The *Spearin* test is similar. In *Spearin*, this Court stated that, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." 248 U.S. at 136. To succeed on an implied warranty claim, the contractor must show: (1) government specifications, (2) with which the contractor complied, and (3) unsatisfactory result. *R.C. Hedreen Co.*, ASBCA No. 20,599, 77-1 BCA ¶ 12,328, at 59,555. The contractor must show also that the government had superior knowledge of the defective specification. *Johns-Manville Corp. v. United States*, 13 Cl. Ct. 72, 118-20 (1987), *vacated on other grounds*, 855 F.2d 1571 (Fed. Cir. 1988).

It is significant that the Court's first application of the government contractor defense was actually premised on the same issues set forth in *Spearin*, *i.e.*, defective government specifications. In *Yearsley v. Ross*, 309 U.S. 18, 20-21 (1940), the Supreme Court concluded a contractor had no liability for riparian damages caused in perform-

[32] The Chamber of Commerce, as amicus curiae in *Boyle*, supported establishment of the government contractor defense. See Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Boyle v. United Technologies*, 487 U.S. 500 (1988) (No. 86-492).

ance of a government contract, because there was "no liability on the part of the contractor for executing [the government's] will." In doing so, the Court effectively created a bridge between the contract-based relief of *Spearin*, and the more broadly based relief in *Boyle* and Section 707.[33] The Federal Circuit ignored this important historical development.

In the instant case, the Federal Circuit held that the petitioners had successfully argued three times that the government contractor defense applied. *Hercules*, 24 F.3d at 199. This argument is flawed, since the government contractor defense several years prior to *Boyle* was not nearly as developed or certain as it is today. Petitioners argued the government contractor defense, but they simply did not win (or lose). *See William T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 21 (1992) (discussing the reasons for settlement). What occurred in settlement—a small payment to lay to rest hundreds of millions of dollars of potential liability—was not a giveaway but rather a recognition that the government contractor defense was uncertain.[34] Because of this uncertainty (which was fanned by government hostility to the defense at the trial court) the government contractor defense did not provide the escape from liability the court of appeals claims. The petitioners incurred liability under their Agent Orange contracts and were forced to pay damages.

That is precisely where the DPA comes in. As even the Federal Circuit recognized, the Agent Orange contracts were imposed upon the petitioners through the DPA,

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[33] Likewise, in *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965), the court found that a contractor who failed to take precautions to prevent damages during performance of a dredging contract was not liable, since "[t]he Government did not provide for such additional precautions in the plans, and [the contractor] is not to be held liable for this omission."

[34] Importantly, although the Agent Orange court (then Judge Pratt) did accept the principles of the government contractor defense, the court thereafter (then Judge Weinstein) adamantly refused to enter judgment on this basis until there was a class settlement.

they were forced to produce what the government demanded, and they thereafter suffered "liability, under contract or otherwise, as the result of compliance with the act or regulations issued under the act." S. Rep. No. 1599, *reprinted in* 1952 U.S.C.C.A.N. at 1818-19. As such, petitioners are entitled to be compensated.

Unfortunately, rather than reading the DPA, the government contractor defense and the *Spearin* doctrine together, the Federal Circuit read them as providing different and inconsistent bases for relief. *See Hercules*, 24 F.3d at 197. However, as the Chamber of Commerce has shown, these three doctrines have nearly identical standards and rationales. They must be read together, and not as mutually exclusive, in order to fulfill Congress' expectation that contractors doing the government's bidding should not be forced to bear costs imposed by the government's decisions.

III. THE FEDERAL CIRCUIT'S INTERPRETATION OF SECTION 707 WOULD PERMIT THE GOVERNMENT TO IMPOSE ONEROUS CONTRACTS FOR HAZARDOUS PRODUCTS ON CONTRACTORS, WHILE FORCING THE CONTRACTORS TO BEAR THE CONSEQUENCES OF THESE DECISIONS

While this appeal does not question the constitutional appropriateness of the War Powers or Defense Production Acts, it must be noted that these acts give the government extraordinary power to compel contractor compliance with executive demands. Because of these powers, the freedom to negotiate, a crucial aspect of traditional contract theory and interpretation, is missing. As the Federal Circuit itself recognizes, "the Government routinely grants itself privileges—like the right to terminate a contract for the Government's convenience without penalty—that are not available to other contracting parties." *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1079 (Fed. Cir. 1993) (Plager, J., concurring). There can be no pretense that contracts with the government are bargained for and executed with equal bargaining power on both sides, and it is well accepted that they are in fact contracts of adhesion.

It is clear that the government has the power to impose contracts entirely against the will of a private party, or, at best, on a take-it-or-leave-it basis. Such contracts cannot be viewed through the lens of traditional common-law rules, since "such a contract is 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather." *Schwartz v. S.S. Nassau*, 345 F.2d 465, 471 (2d Cir.) (quotation omitted), *cert. denied*, 382 U.S. 919 (1965); *see also* Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173 (1983).

The Agent Orange contracts were compulsory, not voluntary. The government drafted the contracts pursuant to the DPA and supplied all specifications. The contractors had no bargaining power at all. Indeed, the contracts at issue cannot even be said to have been let merely on a take-it-or-leave-it basis, but on a "take-it-or-go-to-jail" basis. The contractor could not refuse to produce Agent Orange, demand to produce a safer defoliant, or make one that it felt was more effective. Petitioners had to produce what the government demanded not through negotiation, but submission.[35]

This enormous disparity in contracting power illustrates the rationale for the indemnity provision of Section 707. Where contracting parties negotiate terms and reach a meeting of the minds, they may allocate the risk (and the price) of consequential damages.

In the instant case, however, the contractors had no such option. They were not able to negotiate liability issues because they were ordered to produce what the government demanded. *See Hercules*, 24 F.3d at 190. Moreover, the potential danger of Agent Orange was known solely to the government. The contractors were making a product, under government order, with unknown dan-

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[35] Worse yet, in this case, the government knew that the product potentially was dangerous; it ordered that the product not be labeled as such; and it then knowingly placed military service personnel in harm's way by exposing them to the product. The petitioners had no control over any of these decisions.

gers, unknown liability concerns, and neither the knowledge nor the power to protect themselves from liability. *See William T. Thompson*, 26 Cl. Ct. at 20-21 (Thompson had no input regarding Agent Orange specifications and government's level of knowledge exceeded Thompson's).

The Federal Circuit's view of Section 707 studiously ignores these issues, and is analogous to instances in which parties enter into a contract of adhesion and the drafter attempts to exculpate himself from liability while prohibiting the draftee from protecting himself.[36]

In this case, fundamental fairness requires that the government not be permitted to escape liability for damages suffered by the contractors through third-party actions.[37] The government's actions (and the rulings of the district court) wrongly insulate the government from its own conduct. The reasonable expectations of the contractors were that they would be indemnified for actions taken on behalf of the government—by the *Spearin* doctrine for contract claims, by the *Boyle* government contractor defense for third-party tort claims, and by Section 707 for other liabilities incurred in contract performance. These reasonable expectations are being frustrated by the government's attempt to avoid its statutory liabilities under Section 707.

Further, in imposing the Agent Orange contracts on the petitioners, the government essentially took over petitioners' plants. The petitioners effectively lost the right to their physical plant; the choice of whether or not to engage in business; the choice of what to produce; and the

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[36] Such juxtaposition is all the more egregious in this case because the government opposed the government contractor defense in the trial court and now invokes that defense as a shield.

[37] The Court has stated "where the contract is one of adhesion, where there is great disparity in bargaining power, . . . other legal consequences may ensue." *D.H. Overmyer Co., Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 188 (1972).

choice of what market to enter.[38] Were it not for the protection provided by *Spearin*, *Boyle* and Section 707, these actions would violate the Fifth Amendment prohibitions against government seizure of private property without just compensation.

The government may not force private entities to bear the costs of public benefits. This principle is basic to democratic government. As one of the founders observed, "[g]overnment is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*." James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed. 1906), *quoted in Winstar Corp. v. United States*, 25 Cl. Ct. 541, 548 (1992), *rev'd, petition for reh'g in banc accepted, vacated*, 994 F.2d 797 (Fed. Cir. 1993). To view Section 707 as permitting the government to force liability, as well as production, upon a contractor would be inconsistent with its historical meaning and with other doctrines protecting contractors from liability, and offend basic notions of the sanctity of property from government seizure. For constitutional as well as legal reasons, the Federal Circuit's decision that the DPA provides indemnity only against third-party breach of contract claims must be rejected.

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[38] In this regard *see FMC Corp. v. United States Department of Commerce*, 29 F.3d 833, 844 (3d Cir. 1994) (government exerted such pervasive control over contractor in ordering it to produce synthetic rubber products that government had operator liability under CERCLA); *see also Holodnak v. Avco Corp.*, 514 F.2d 285, 289 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) (government insinuated itself to such an extent into business of contractor that it was a "joint participant" in contractor activities).

IV. THE GOVERNMENT'S ACTIONS ARE PART OF A PATTERN TO AVOID LIABILITY FOR THE CONSEQUENCES OF ITS WARTIME CONTRACTS

In the instant case, the government has sought to avoid indemnifying the petitioners under contracts it imposed pursuant to the DPA. While this may seem inconsistent with the government's current position that contractors are immune from government contract liability under *Boyle*, it is consistent with the government's attempts, in this forum and in many others, to avoid the costs of its past decisions, costs which in many cases are only now becoming clear.[39] Now that the government is realizing the cost implications of its compulsory contracts for hazardous materials critical to various defense efforts, it has sought to shift these costs of its policies to the private entities which were compelled to place these policies into effect.

The DPA is not the only act placing liability for public policy on the government. The government faces the same threat, and has reacted similarly, in other contexts. For example, in the environmental context, the government has sought to avoid liability under the Comprehensive En-

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[39] Before the district court, the government attacked the government contractor defense, which it then championed to the court of appeals. Such defense could also be estopped under the doctrine of inconsistent positions. When "the party against whom estoppel is invoked received some benefit from the previously taken position, i.e., he 'won' because of it and seeks to 'win again' from his original adversary (or one in privity with that person or involved in the same transaction) on a basis which contradicts the prior position," the doctine will apply. *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1579-80 (Fed. Cir. 1984).

The requirements for the doctrine are reliance and prejudice. *Id.* at 1580. The reliance component is the same as in a traditional reliance claim. *See id.* at 1579-80. The prejudice component is the detriment incurred by that reliance. *Id.* The underlying concern with the doctrine is abuse of the judicial system through clever, amoral advocacy. Litigants are to be discouraged from playing " 'fast and loose' with the judicial process." 1B James W. Moore et al., *Moore's Federal Practice* § 0.405[8], at III-55 (2d ed. 1994); *Scarano v. Central R.R. of N.J.*, 203 F.2d 510 (3d Cir. 1953).

vironmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (1988). An interesting, albeit unsuccessful government attempt to avoid such liability arose recently in *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994).

FMC involved World War II synthetic rubber production contracts with a number of companies produced at a plant over which the government exerted considerable control. As in the instant case, in *FMC* the government used its wartime powers to compel production of war materials. *FMC Corp. v. United States Dep't of Commerce*, 786 F. Supp. 471, 474-75 (E.D. Pa. 1992).

Years later, the Environmental Protection Agency sought to recover the costs of cleaning up production waste that remained at the plant from a subsequent owner, FMC Corporation. FMC sought contribution under CERCLA from the government, claiming that the hazardous waste was due to wartime government contracts. The government raised a number of jurisdictional and substantive challenges to FMC's contribution claims.

In a divided en banc opinion, the Third Circuit held that the government had waived sovereign immunity to liability under CERCLA, and that given the extent of government control over the facility, it shared liability for environmental clean up. In chiding the government for its assertion that a finding of governmental liability would result in costs far in excess of anything Congress could have intended under CERCLA, the Court noted, "we point out that at bottom our result simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor consistent with the policy underlying CERCLA." *FMC*, 29 F.3d at 846; *see also Elf Atochem N. Am., Inc. v. United States*, 868 F. Supp. 707, 712-13 (E.D. Pa. 1994) (United States unsuccessfully contends that World War II-era pollution at chemical plant could not implicate government under CERCLA; cleanup liability imposed).[40]

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[40] In different factual circumstances, the government has avoided CERCLA liability by arguing it had insufficient control to be liable

The government's actions in *FMC* are a primer to its actions here. In the instant case, the government, through the DPA, required production of Agent Orange, which it deemed necessary to the war effort in Vietnam. As a direct result of these required production contracts, the petitioners at bar suffered liability. For the United States to avoid the costs of the consequences of these contracts would be neither fair nor consistent with the requirements of the DPA and its underlying policy.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests the Court to grant the petition for writ of certiorari.

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as an operator or arranger at a former Agent Orange plant. In *United States v. Vertac Chemical Corp.*, 1995 U.S. App. Lexis 1754 (8th Cir. Jan. 31, 1995), the Eighth Circuit reviewed the history of the plant, formerly operated by Hercules. While finding the rated contracts issued to Hercules were "substantially dictated by [the government]," the court also found that the government did not own the raw materials, and that Hercules' contracts did not address the disposal of wastes. *Id.* at *6-*7. Since the government's "actual involvement" at the facility was "sporadic and minimal," the government could not be held liable as an arranger. *Id.* at *24. The court of appeals also adopted the Federal Circuit's view that the DPA does not provide general indemnity for government contractors. *Id.* at *27.

Of course, the *Vertac* analysis is inapplicable here, for it is undisputed in the instant case that the government mandated the composition and production of Agent Orange. It is useful, however, as an example of the government's efforts to limit liability for damages caused under its DPA contracts.

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HERCULES INCORPORATED
and
WM. T. THOMPSON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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Note:

The following documents do not appear in this Joint Appendix but were reproduced in the Appendix to the Petition for Writ of Certiorari:

Appendix A:

Federal Circuit decision on consolidated appeals of *Hercules v. United States* and *Thompson v. United States* (5/4/94) 1a-46a

Appendix B:

U.S. Claims Court Opinion in *Hercules v. United States* (4/2/92) 47a-80a

Appendix C:

U.S. Claims Court Judgment in *Hercules v. United States* (4/2/92) 81a

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The following documents do not appear in this Joint Appendix but were reproduced in the Joint Appendix to the Federal Circuit Appeal:

Joint Appendix 8:

Plaintiffs first set of interrogatories in *Hercules v. United States* (1/11/91) 0153-0224

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Plaintiffs first set of request for production of documents in *Hercules v. United States* (2/20/91) ..0225-0239

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Joint Appendix 17:

Letter dated October 23, 1990 from John E. Daniel, Esq. to Michael Scadron, Esq. re: *Hercules v. United States* 0765-0766

UNITED STATES CLAIMS COURT

Case No. 90-391C

WM. T. THOMPSON COMPANY,
A Missouri Corporation

v.

THE UNITED STATES

RELEVANT DOCKET ENTRIES

Date	Proceedings
1990	
5/7	COMPLAINT
7/6	ANSWER by defendant
10/22	MOTION by plaintiff's for leave to file amended complaint filed by leave of the judge. [ALLOWED: 10/23/90]
10/23	AMENDED COMPLAINT by plaintiff's
11/20	MOTION by defendant's to dismiss or summary judgement (Rule 12 & 56) and appendix contained in 1 document filed by leave of the judge
11/20	PROPOSED FINDINGS by defendant's of uncontroverted fact filed by leave of the judge.
11/29	ORIGINAL DECLARATION by defendant's of Mr. Lindsay Moose
1991	
2/19	CROSS-MOTION by plaintiff's for summary judgement and opposition to motion to dismiss; statement of material fact not in controversy; statement of genuine issues and appendix filed by leave of the judge.

Date	Proceedings
1991	
3/25	STATEMENT by defendant's of genuine issue in opposition to cross-motion for summary judgement
3/25	REPLY MEMORANDUM by defendant's in support of motion to dismiss
4/25	REPLY by plaintiff's filed by leave of the judge 4/22/91
6/14	ORDER entered scheduling oral argument
7/25	SUPPLEMENTAL MEMORANDUM by plaintiff's re: recent developments in the law
7/25	SUPPLEMENTAL MEMORANDUM by defendant's
7/29	SUBMISSION by defendant's pursuant to court's request filed by leave of the judge
7/30	TRANSCRIPT of proceedings on July 25, 1991
8/16	SUBMISSION by plaintiff's pursuant to court's request
1992	
4/22	OPINION by judge
4/22	JUDGMENT entered that petition is dismissed
6/19	NOTICE of appeal by plaintiffs

UNITED STATES CLAIMS COURT

Case No. 90-496C

HERCULES INCORPORATED

v.

THE UNITED STATES

RELEVANT DOCKET ENTRIES

Date	Proceedings
1990	
6/8	COMPLAINT
9/9	ANSWER
8/13	ORDER for pretrial by judge
1991	
1/8	MOTION to dismiss by defendant's (Rule 12) or for summary judgment; and proposed findings of controverted fact filed
2/6	MOTION by defendant's for protective order [ALLOWED: 6/14/91]
2/25	RESPONSE by plaintiff's to motion for protective order
3/5	REPLY by defendant's to response to motion for protective order
3/13	OPPOSITION by plaintiff's to defendants motion to dismiss and for summary judgment, with appendix, filed by leave of the judge

Date	Proceedings
1991	
3/13	AFFIDAVITS of John P. Frawley and John E. Daniel filed by leave of the judge
3/13	STATEMENT by plaintiff's of genuine issues filed by leave of the judge
4/8	REPLY BRIEF by defendant's
6/14	ORDER entered allowing the 2/6/91 motion for protective order granting discovery
1992	
3/18	TRANSCRIPT of proceedings on March 12, 1992
4/2	OPINION by judge
4/2	JUDGMENT entered that the complaint is dismissed
5/26	NOTICE of appeal by plaintiffs

IN THE UNITED STATES CLAIMS COURT

No. 90-496

HERCULES INCORPORATED,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Plaintiff Hercules Incorporated, for its complaint against defendant the United States of America, alleges upon knowledge with respect to its own acts and upon information and belief as to all other matters as follows:

NATURE OF THE CLAIMS

1. Hercules Incorporated ("Hercules") seeks contractual indemnification against defendant United States of America ("USA") for damages arising from contracts between defendant and Hercules. Hercules seeks to recover from the USA increased expenses of performance and damages Hercules has sustained and costs, including attorneys fees, it has incurred in defending and settling cases (the "Agent Orange cases") brought by certain plaintiffs in connection with claimed exposure to phenoxy herbicides, including Agent Orange (collectively referred to hereinafter as "Agent Orange"), in Southeast Asia or in connection with the conflict in Southeast Asia (collectively referred to hereinafter as "Southeast Asia").

JURISDICTION

2. Jurisdiction of the Court is invoked pursuant to the Tucker Act, 28 U.S.C. § 1491 (1970), as amended.

PARTIES

3. Hercules is a corporation organized under the laws of the State of Delaware and has its principal place of business in Delaware. Hercules is the sole owner of the claims asserted herein and is entitled to recover the amounts claimed from the defendant.

4. The USA is a sovereign state which has consented to be used under the Tucker Act.

GENERAL FACTUAL ALLEGATIONS

A. The USA's Formulation of Phenoxy Herbicides and Development of An Agent Orange Specification

5. As early as World War II, the USA undertook defoliant research with phenoxy herbicides, including 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T") and 2,4-dichlorophenoxyacetic acid ("2,4-D").

6. After World War II, both 2,4-D and 2,4,5-T were introduced for commercial use as herbicides. Hercules began to produce such products commercially in 1961 after it purchased Reasor-Hill, a herbicide manufacturer.

7. During the early 1960's, the USA also conducted experiments with many herbicides, including 2,4,5-T and 2,4-D, to formulate herbicides specifically for military use in Southeast Asia. Hercules did not participate in this or the earlier experimentation or formulation.

8. Based on its experimentation, the USA developed the Agent Orange formulation for militarily use in Southeast Asia. Agent Orange, as formulated by the USA, consisted of a mixture of fifty percent 2,4-D and ffity percent 2,4,5-T butyl esters.

B. Hercules' Commercial Sale of Phenoxy Herbicides With Federally Sanctioned Warnings and Instructions for Use

9. The 2,4-D and 2,4,5-T products sold commercially by Hercules in the 1960's carried an identification of their active ingredients as well as instructions for use which called for heavy dilution of the product. For example, the instructions for use of Hercules' Butyl Ester B-2D-2T herbicide, which contained approximately equal amounts of 2,4-D and 2,4,5-T, called for application using one gallon of the herbicide mixed with 99 gallons of water.

10. Hercules' herbicides also contained extensive warnings, which alerted the user, among other things, as follows:

(a) "Minute quantities may cause severe injury by drift or vaporization. Avoid drift of spray and use a coarse spray which is less likely to drift."

(b) "DO NOT contaminate any body of water by direct application, cleaning of equipment, or disposal of wastes and containers. Toxic to fish."

(c) "DO NOT graze dairy animals on treated areas within six weeks after application."

(d) "DO NOT use around the home, recreation areas, or similar sites."

(e) "DO NOT contaminate feed or foodstuffs."

(f) "DO NOT use spray equipment contaminated with this product for any other purpose."

(g) "DO NOT reuse empty containers. Destroy by burying in a safe place away from water supplies."

(h) "CAUTION—This product may cause skin irritation. Avoid inhaling spray mist. Harmful if swallowed. Avoid contact with the eyes, skin, or clothing. Flush eyes with clear water and get prompt medical attention."

11. The warnings and instructions for use provided on Hercules' herbicide products were supplied in compliance with federal regulation, including the version of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") in effect at that time. Pursuant to FIFRA, Hercules' phenoxy herbicide products had been registered with the U.S. Department of Agriculture ("USDA") and the warnings and instructions for use provided on such products had been cleared through the USDA.

12. Hercules sold 2,4,-D products commercially for the removal of broad leaf weeds, such as dandelions. Hercules sold 2,4,5-T products to remove woody plants, such as chickweed and poison ivy. Hercules also sold herbicidal products which contained a mixture of 2,4-D and 2,4,5-T.

13. Hercules sold most of its 2,4-D and 2,4,5-T products at virtually pure concentrations to commercial applicators who, in accordance with Hercules' instructions for use, substantially diluted the herbicides. Hercules sold a smaller amount of 2,4-D and 2,4,5-T products directly to the public with warnings and instructions substantially to dilute the concentrations for proper use.

14. Hercules also sold versions of the same commercial 2,4-D and 2,4,5-T products to the U.S.A. for peacetime use. These commercial herbicide products, like those sold to the private sector, carried identification of active ingredients, warnings and instructions for use.

15. The intended and actual commercial use of the 2,4-D and 2,4,5-T products made and commercially sold by Hercules was thus at very low concentrations and rates of application and for standard selective weed removal purposes.

C. The USA's Contracts With Hercules

16. Beginning in May 1964, the USA contracted with Hercules to purchase Agent Orange for use by the USA in Southeast Asia. These written contracts included the

following contracts entered into on or about the dates indicated:

1. DSA-6-6737, May 8, 1964;
2. DSA-6-6791, July 9, 1964;
3. AF(08)635-4636, August 7, 1964;
4. DSA-6-8731, December 17, 1964;
5. DSA-4-062806-PC409, July 19, 1965;
6. DSA-4-OA3409-PC409, March 21, 1966;
7. DSA-4-OB1282-PC409, April 21, 1966;
8. DSA-4-OB6156-PC409, May 5, 1966;
9. AF-08-635-5906, May 20, 1966;
10. DSA-400-66-C-0979-PC409, June 20, 1966;
11. DSA-400-67-C-1633-PC409, September 1, 1966;
12. DSA-400-67-C-8314, April 25, 1967;
13. DSA-400-68-C-4707, March 1, 1968;
14. DSA-400-68-M-BC65, April 4, 1968;
15. DSA-400-68-C-6093, May 20, 1968;

17. The USA's contracts with Hercules for Agent Orange promulgated specifications for Agent Orange. Hercules was required to comply, and did comply, with these specifications in producing the Agent Orange it sold to the USA.

18. The specifications for Agent Orange promulgated by the USA, *inter alia*, (a) did not provide any limitation on the amount of by-products that could be contained in Agent Orange and (b) did not provide for, and precluded the provision of, identification of active ingredients, warnings and instructions for safe use concerning Agent Orange.

19. The Agent Orange which Hercules supplied to the USA was manufactured and supplied under the man-

date of the USA pursuant to the Defense Production Act of 1950, as amended, 50 U.S.C.A. App. §§ 2061 et seq.

20. As a result of the foregoing specifications and requirements, the Agent Orange supplied by Hercules to the USA was packaged by Hercules in containers which contained no identification of active ingredients, no warnings and no instructions concerning use. At the same time, Hercules was placing warnings, instructions for use and identification of active ingredients on 2,4-D and 2,4,5-T products which Hercules was selling commercially, both to the private sector and the USA, for peacetime use as a herbicide.

D. The USA's Unprecedented Military Use of Agent Orange in Southeast Asia and the Potential Health Risks Attendant With Such Use

21. The Agent Orange provided by Hercules to the USA was used by the USA and those acting in concert with it in the conflict in Southeast Asia that was going on at the time.

22. At the time the USA developed its specifications for Agent Orange and purchased Agent Orange from Hercules made pursuant to those specifications, the USA knew or had reason to know that the Agent Orange posed possible health hazards if utilized in the unprecedented ways it was to be used, and was used, in Southeast Asia.

23. The USA was aware, or had reason to be aware, that its intended and actual use of Agent Orange in Southeast Asia involved an unprecedented use in unprecedented quantities, concentrations and rates of application. This wartime use, which was entirely different from the previous and contemporaneous peacetime commercial use of 2,4-D and 2,4,5-T, included use in battlefield situations in undiluted form and at overkill rates, wholesale dumping to escape enemy fire and application of Agent

Orange to areas well beyond those intended to be sprayed. Even the containers in which Agent Orange was packaged were misused; empty containers were used as shower stalls, barbecues and water storage receptacles.

24. In connection with the above unprecedented military use of Agent Orange by the USA in Southeast Asia, the USA failed to provide identification of active ingredients as well as warnings and instructions adequate for use.

25. Even before the USA purchased Agent Orange from Hercules, the USA was aware that the unprecedented use of Agent Orange in Southeast Asia posed possible health hazards. For example, a report prepared in 1963 by the Institute for Defense Analysis for the Department of Defense concluded that phenoxy herbicides were safe when used commercially, but could be hazardous in military use because higher concentrations would be applied by less experienced personnel under the pressures that are inherent in battle field use.

26. The unprecedented intended and actual use of Agent Orange by the USA in Southeast Asia as a military agent, rather than as the agricultural agent commercially marketed by Hercules, and the potential safety hazards attendant with such unprecedented military use, were not known or reasonably foreseeable to Hercules.

E. Hercules' Voluntary Removal of Dioxin From Its Agent Orange

27. In February 1965, Hercules' representatives were invited to attend a session with other herbicide manufacturers. At that session, held in March 1965, Hercules' representatives were advised for the first time that dioxin was a by-product of 2,4,5-T production and that dioxin could be highly toxic.

28. Hercules immediately thereafter embarked upon a program to reduce the level of dioxin contained in its

Agent Orange and 2,4,5-T products. Toward that end, Hercules implemented a toluene extraction process which enabled Hercules virtually to eliminate the dioxin in its products. Beginning in or about January 1966, the level of dioxin contained in Agent Orange sold by Hercules to the USA was reduced to the point of being undetectable.

29. At the time the USA developed its specification for Agent Orange and during the time the USA purchased Agent Orange from Hercules, the USA knew that dioxin was a by-product of 2,4,5-T production.

30. In using Agent Orange in Southeast Asia, the USA mixed the Agent Orange supplied by Hercules with that supplied by other manufacturers.

F. The USA's Cessation of Use of Agent Orange

31. In 1969 the USA ended its use of Agent Orange in Southeast Asia and its purchase of Agent Orange from Hercules. This cessation of use followed public disclosure of the findings in the Bionetics Report sponsored by the National Institute of Health concerning possible teratogenic effects related to 2,4,5-T.

G. The Agent Orange Cases

32. Beginning in 1979, lawsuits were commenced against Hercules and other manufacturers of Agent Orange. These lawsuits were consolidated in the United States District Court for the Eastern District of New York (the "Agent Orange Litigation").

33. The individual plaintiffs in the Agent Orange Litigation were (1) individuals who were or had been members of the U.S. military and allied military, or employees of civilian agencies, who had been exposed, by reason of the USA's actions, to Agent Orange in Southeast Asia, or (2) the spouses or children, born and unborn, of individuals who had been exposed to Agent Orange. The plaintiffs alleged, among other things, that

the defendants negligently had manufactured and sold Agent Orange and that the USA negligently had used Agent Orange. They also asserted claims based on theories or strict liability, breach of warranty and intentional tort and nuisance.

H. The USA's Extensive Involvement In the Agent Orange Litigation

34. The USA initially was named as a defendant in the Agent Orange Litigation. Thereafter, the USA was named as a third party defendant by Hercules and by other defendants in the Agent Orange Litigation.

35. The USA participated extensively and fully in the Agent Orange Litigation, including in the discovery stage of the Litigation.

I. The Settlement of the Agent Orange Litigation and Consequent Damage to Hercules

36. Notwithstanding Hercules' denial of responsibility for personal injuries allegedly caused by exposure to Agent Orange, and because of the expensive, uncertain and time-consuming nature of litigation and the potential liability alleged, Hercules settled the Agent Orange Litigation. The USA failed and refused to participate in or contribute in any way toward the settlement. In October 1984, pursuant to a settlement agreement, Hercules caused $18,772,568 to be paid into a special settlement fund for distribution to various plaintiffs in the Agent Orange litigation.

37. The cost to Hercules of the Agent Orange Litigation was not limited to the settlement amount paid to the plaintiffs. In addition, Hercules incurred substantial costs, including legal expenses, in connection with and as a result of the Agent Orange Litigation. To date, these expenses exceed $6 million.

J. Other Related Lawsuits

38. Some plaintiffs in the Agent Orange Litigation did not agree to the settlement and instead proceeded against Hercules and others. Other Agent Orange cases have also been brought against Hercules. By reason of these actions, some of which have been concluded, Hercules has incurred, and can be expected to incur, additional damages, costs and expenses, including attorneys fees.

39. Hercules may incur additional damages as the result of pending and anticipated Agent Orange cases and Hercules will supplement this complaint, if necessary or appropriate, to assert these additional damages and grounds for relief.

40. No action is now pending on Hercules' claim in Congress, in any department of the defendant or in any judicial proceeding other than as set forth herein.

FIRST CLAIM FOR RELIEF

(Breach of Warranty of Adequate Specifications and Requirements)

41. Hercules repeats and realleges each and every allegation set forth in paragraphs 1 through 40 as if set forth at length herein.

42. The USA promulgated and enforced mandatory contract specifications and requirements for Agent Orange, including packaging and labelling specifications and requirements which failed to provide for, and precluded the provision of, identification of active ingredients, warnings and instructions for safe use on the Agent Orange sold to the USA. Defendant warranted the adequacy and suitability of said specifications and requirements for defendant's intended and actual military use, including that Agent Orange could be sold by Hercules for safe use in Southeast Asia without the need for appropriate identification of active ingredients, warnings and instructions for safe use.

43. Defendant breached this contractual warranty to Hercules by failing to establish specifications and requirements for Agent Orange sufficient to make Agent Orange adequate and suitable for the unprecedented intended and actual military use to which it was put in Southeast Asia, including by failing to establish packaging and labelling specifications and requirements which would have permitted Hercules to set forth in the packaging and/or labelling of its Agent Orange sold to the USA an identification of active ingredients, warnings and instructions sufficient to make Agent Orange adequate, suitable and safe for its unprecedented military use in Southeast Asia.

44. By breaching its warranty to Hercules, defendant caused Hercules to sustain increased expenses of performance and incur substantial monetary damages in connection with the Agent Orange Litigation and other Agent Orange cases in which claimants have alleged personal injury from exposure to Agent Orange made, packaged and sold by Hercules and others pursuant to defendant's specifications and requirements. Hercules has expended considerable sums in defending and settling such cases and is entitled to contractual indemnification from defendant therefor.

SECOND CLAIM FOR RELIEF

(Breach of Duty to Disclose Knowledge of Unprecedented Military Use and Potential Health Risks Attendant With Such Use)

45. Hercules repeats and realleges each and every allegation set forth in paragraphs 1 through 40 as if set forth at length herein.

46. Defendant established mandatory contract specifications and requirements for Agent Orange manufactured for and sold to defendant, including packaging and labelling specifications and requirements which precluded Hercules from placing identification of active ingredients,

warnings and instructions for safe use on the Agent Orange manufactured for and sold to defendant.

47. At and prior to the time of contracting with Hercules for the manufacture, purchase and sale of Agent Orange, defendant had actual knowledge that Agent Orange, when used in Southeast Asia in the unprecedented military manner intended and actually used by the USA, and absent adequate identification of active ingredients, warnings and instructions for use, might endanger the health and safety of those exposed to Agent Orange.

48. At all relevant times, defendant had greater knowledge than Hercules concerning defendant's intended and actual unprecedented military use of Agent Orange in Southeast Asia and the possible health risks attendant with such use.

49. Defendant's actual and intended unprecedented military use of Agent Orange in Southeast Asia, and the possible health risks attendant therewith, were not known or reasonably foreseeable to Hercules. The USA knew or should have known that fact and that Hercules had no reason to obtain such knowledge.

50. Defendant had a contractual duty to reveal to Hercules its superior knowledge of the unprecedented military use of Agent Orange by the USA in Southeast Asia and the possible dangers attendant with such use. The USA's specification for Agent Orange misled or failed to put Hercules on notice concerning such unprecedented military use and possible dangers.

51. Defendant breached its contractual duty by withholding from Hercules defendant's superior knowledge concerning the unprecedented military use of Agent Orange by the USA in Southeast Asia, and the possible health risks attendant with such use, while at the same time inducing and mandating Hercules to enter into contracts for the manufacture and sale of Agent Orange.

52. By breaching its contractual duty to disclose its superior knowledge to Hercules, defendant caused Hercules to sustain increased expenses of performance and incur substantial monetary damages in connection with the Agent Orange cases, and Hercules was and is entitled to contractual indemnification therefor.

THIRD CLAIM FOR RELIEF

(Breach of Duty to Exercise Due Care in Using Hercules' Agent Orange)

53. Hercules repeats and realleges each and every allegation set forth in paragraphs 1 through 40 as if set forth at length herein.

54. The USA was aware that Agent Orange posed possible health risks if used militarily in the unprecedented manner it was used in Southeast Asia, including use without adequate precautions, safeguards, identification of active ingredients, warnings and instructions for safe use. Despite such knowledge, defendant did not use the Agent Orange it purchased from Hercules in Southeast Asia in a manner reasonably calculated to avoid such potential health risks and failed to take adequate precautions and safeguards or provide identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

55. By reason of the foregoing, and by reason of defendant's preclusion in its Agent Orange specifications of identification of active ingredients, warnings or instructions for safe use, defendant had a contractual duty to Hercules to use Agent Orange in Southeast Asia in a manner designed to avoid potential health risks, including by taking adequate precautions and safeguards and providing identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

56. Defendant breached its contractual duty to use Agent Orange in Southeast Asia in a manner designed to

avoid potential health risks, including by failing to take adequate precautions and safeguards or provide identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

57. By breaching its contractual duty to exercise due care, defendant caused Hercules to sustain increased expenses of performance and incur substantial monetary damages in connection with the Agent Orange cases, and Hercules is entitled to contractual indemnification therefor.

FORTH CLAIM FOR RELIEF

(Breach of Duty of Good Faith and Duty Not to Increase Contract Costs)

58. Hercules repeats and realleges each and every allegation set forth in paragraphs 1 through 40 as if set forth at length herein.

59. The USA was aware that Agent Orange posed possible health risks if used in the unprecedented military manner it was used in Southeast Asia, including use without adequate precautions, safeguards, identification of active ingredients, warnings and instructions for safe use. Despite such knowledge, defendant did not use Agent Orange in Southeast Asia in a manner reasonably calculated to avoid such potential health risks and failed to take adequate precautions and safeguards or provide identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

60. By reason of the foregoing, and by reason of defendant's preclusion of any identification of contents, warnings and instructions for safe use, defendant had a contractual duty to Hercules to provide Hercules with the benefit of its bargain and not to subject Hercules to increased costs by virtue of third party actions against Hercules or otherwise. Defendant, as a result, had a

contractual duty to Hercules to use Agent Orange in Southeast Asia in a manner designed to avoid potential health risks, including by taking adequate precautions and safeguards and providing identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

61. Defendant breached its contractual duty to exercise good faith and not increase Hercules costs by using Agent Orange in Southeast Asia in an unprecedented military manner that failed to avoid potential health risks, including by not taking adequate precautions and safeguards or providing identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

62. By breaching its contractual duty to exercise good faith and not increase Hercules' costs, defendant caused Hercules to sustain increased expenses of performance and incur substantial monetary damages in connection with the Agent Orange cases, and Hercules is entitled to contractual indemnification therefor.

WHEREFORE, Hercules requests that this Court award judgment against the defendant as follows:

1. Award Hercules the full amount of all settlements paid by Hercules to claimants in the Agent Orange cases, in an amount not less than $18,772,568.

2. Award Hercules all costs, including attorneys fees and disbursements, expended by Hercules in defending and settling the Agent Orange cases, in an amount not less than $6 million.

3. Award Hercules all other expenses and costs incurred as a result of and in connection with the Agent Orange cases.

4. Award Hercules all other financial and consequential damages caused by defendant's breach of its contractual warranties and duties.

5. Award Hercules such other and further relief as the Court deems just and proper.

Dated: New York, New York
June 6, 1990

By: /s/ Nicholas L. Coch
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IN THE UNITED STATES CLAIMS COURT

No. 90-391C

WM. T. THOMPSON COMPANY,
a Missouri Corporation,
318 Georgia Avenue,
Santa Monica, California 90402
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

AMENDED COMPLAINT FOR BREACH OF CONTRACT, INDEMNIFICATION, MISREPRESENTATION, AND UNCONSTITUTIONAL TAKING

Plaintiff Wm. T. Thompson Company, by and through counsel, in support of its claims against the United States of America alleges as follows:

JURISDICTION

I) This complaint is brought pursuant to 28 U.S.C. § 1491.

PLAINTIFF

2) Plaintiff Wm. T. Thompson Company is a corporation duly organized under the laws of the State of Missouri with its principle place of business in Carson, California. On or about February 8, 1965, Thompson Chemicals Corporation, a California Corporation, as part of a re-organization of the company, merged into the William T. Thompson Company, duly organized under the laws of California on November 19, 1945.

3) On or about December 12, 1967, as part of a re-organization of the company, the William T. Thompson Company merged with the Thompson Land & Development Company, a Missouri corporation incorporated on

September 26, 1963, and the surviving entity, The Thompson Land Development Company, Inc., continued as a Missouri corporation.

4) Thompson Land and Development Company, Inc. changed its name to Wm. T. Thompson Company, on December 12, 1967.

5) On January 19, 1990, the Wm.T. Thompson Company transferred all of its assets to assignee David Blondner, Esquire. Wm. T. Thompson Company no longer conducts business. The assets are now owned and business conducted by D. K. Labs, Inc., duly organized under the laws of California, doing business as Thompson Nutritional Products.

BACKGROUND TO THE AGENT ORANGE PROCUREMENT

6) This claim arises out of the liability incurred by manufacturers of the defoliant known as Agent Orange for bodily injury claims from the exposure to Agent Orange by United States military personnel during the Vietnam War. In late 1961, President Kennedy approved a joint recommendation of the Departments of State and Defense to initiate defoliant operations in Vietnam. This program, which became known as Project Ranch Hand, got under way in January, 1962 with the commencement of spraying operations. As the war in Vietnam escalated, so did the intensity of the use of Agent Orange, with peak usage in 1967. The use of the herbicide was terminated by Executive Order of President Nixon in 1969.

7) Agent Orange is a mixture of two herbicides in a 50/50 blend: namely 2,4-Dichlorophenoxyacetic Acid (2,4-D) and 2,4,5-Trichlorophenol (2,4,5-T). The purposes of using Agent Orange was to defoliate the trees and plant life so as to destroy possible hiding places for Viet Cong and North Vietnamese troops and their supplies as well as their food crops. The product, a liquid

with a molasses like color, was dropped on the foliage from either helicopters or airplanes. Agent Orange contained, in varying degrees, 2,3,7,8 tetrachlorodibenzo-p-dioxin (TCDD, hereinafter "dioxin"), an unwanted by product which was alleged to be the causative agent of the Agent Orange litigants' injuries.

BACKGROUND TO THE THOMPSON CONTRACTS

8) Between the early 1950's and on or about the beginning of 1970, Thompson Chemicals Corporation (hereinafter "Thompson") had operated an agricultural chemical manufacturing plant in St. Louis, Missouri. On or about the beginning of 1970, Thompson ceased operations at this St. Louis plant.

9) On or about April 19, 1967, Thompson was required to enter into a fixed price production contract by the Directorate of Procurement and Production, Defense General Supply Center (hereinafter referred to, along with all other agencies of the United States Government, as the "Government"), No. DAS-400-67-C-8172 (hereinafter referred to as the "'8172 contract") under the Defense Production Act, 50 U.S.C. §§ 2051 et seq. The Government, under the '8712 Contract, required Thompson to produce, for a fixed, a specified quantity of a herbicide that has come to be known as Agent Orange. The '8712 Contract specified the formula for producing Agent Orange and Thompson strictly complied with these specificatoins, as well as complying with the terms of the '8712 Contract in all other material respects. Thompson had no input with the Government with respect to developing or modifying the specifications for Agent Orange.

10) The '8712 Contract was issued pursuant to the Defense Production Act. The Government, under the authority of the Act, compelled Thompson, on pain of criminal penalties, to undertake to produce Agent Orange and to give priority of performance to this contract, even at the expense of Thompson's other non-defense business.

11) On or about May 24, 1968, Thompson was required to enter into Contract No. DSA-400-68-C-6250 (hereinafter the "the '6250 Contract") by the Government under the Defense Production Act. The Government, under the '6250 Contract, compelled Thompson to produce, at a fixed price, a specified quantity of the herbicide known as "Agent Orange". The '6250 Contract specified the formula for producing Agent Orange and Thompson strictly complied with these specifications, as well as complying with the terms of the '6250 Contract in all other material respects. Thompson had no input with the Government with respect to developing or modifying the specifications for Agent Orange.

12) The '6250 Contract was issued pursuant to the Defense Production Act, 50 U.S.C. App. §§ 2051 et seq. The Government, under the authority of the Act, compelled Thompson, on pain of criminal penalties, to produce Agent Orange and to give priority of the performance of this contract over the performance of other contracts, even at the expense of Thompson's other non-defense business.

13) Judge George C. Pratt found that Thompson was an unwilling producer of Agent Orange who had informed the Government that it would not manufacture Agent Orange. After Thompson refused to respond to a number of requests for bids for Agent Orange Production, the Government ordered Thompson under the Act to enter into the contracts described in ¶¶ 9-12, *supra*. 565 F. Supp. 1263, 1272, 1275 (E. D. N.Y. 1983). No subsequent court proceeding has altered this finding.

14) Government inspectors surveyed the Thompson facility and informed Thompson of the output levels the Government would require. Thompson began manufacture of Agent Orange using a level of heat and pressure lower than the industry standard. The Government, in an effort to increase production, required Thompson accelerate production through an increase in heat and pressure.

15) It is well established that levels of dioxin contamination in 2, 4, 5 Trichlorophenol (a precursor to 2, 4, 5 T, a major component of Agent Orange) is proportional to the degree of heat and pressure, and that the Government's requirement that accelerated levels of heat and pressure be used to manufacture Agent Orange significantly increased the likelihood that Agent Orange would contain increased levels of dioxin.

16) The Government had knowledge superior to Thompson about the various manufacturing and hazardous disposal processes necessary to produce Agent Orange. The Government had knowledge superior to Thompson about the toxicities, environmental hazards, environmental fate, health risks, and intended use of Agent Orange. Thompson had no independent knowledge as to the manufacturing or disposal processes which would have reduced the toxicities, environmental hazards, environmental fate, or health risks of Agent Orange.

THE "AGENT ORANGE" LITIGATION

17) Starting in 1979, American veterans of the Vietnam War (or their estates) began filing negligence and strict liability actions against companies that produced Agent Orange for the Government (eventually Australian and New Zealand veterans joined in these actions). Thompson was named as a defendant in a majority of these cases. According to these plaintiffs, exposure to Agent Orange during the Vietnam War resulted in various cancers such as soft tissue sarcoma and afflictions such as chloracne, as well as miscarriages by veterans' wives and birth defects in their children. Although cases were originally filed in the Eastern District of New York, Southern District of New York and Northern District of Illinois, the actions were consolidated in the Eastern District of New York under the heading MDL No. 381.

18) Some 600 additional tag-along cases were subsequently consolidated under MDL No. 381, *In re Agent*

Orange Product Liability Litigation, 597 F. Supp. 740 (E. D. N.Y. 1984).

19) Thompson was granted summary judgment by Judge George C. Pratt on May 20, 1983 based upon the finding that not only did Thompson know less than the Government about the hazards of Agent Orange, there was no evidence that Thompson had any knowledge about any toxicity problems associated with Agent Orange. 565 F. Supp. 1263, 1272-73 (E. D. N.Y. 1983).

20) Hercules was also granted summary judgment by Judge Pratt on May 20, 1983. 565 F. Supp. 1263, 1273-74 (E. D. N.Y. 1983). The United States was dismissed from the litigation by Judge Pratt. 534 F. Supp. 1046 (E. D. N.Y. 1982).

21) On October 21, 1983, in a meeting with newly assigned Chief Judge Jack B. Weinstein, Thompson was informed that the May 20, 1983 grant of summary judgment was reversed, and that Thompson was again a defendant. On the same date, Hercules and the United States were also brought back in the suit as parties, in an effort by Judge Weinstein to press for settlement among the largest number of defendant's possible.

22) Thompson moved for reconsideration of Chief Judge Weinstein's reversal of summary judgment. Despite having successfully won summary judgment from Judge Pratt, an order denying summary judgment was issued by Chief Judge Weinstein on November 29, 1983, and Thompson was once again made a part of the litigation.

23) On or about 4:00 a.m., May 7, 1984, the date assigned for trial, the defendants and plaintiffs reached a settlement in which the defendants contributed to create a $180 million settlement fund. The settlement agreement is set forth as an appendix to the fairness opinion. 597 F. Supp. 740 (E.D.N.Y. 1988). Thompson, who had manufactured less than two percent (2%) of the Agent Orange complained of, and who had a correspondingly negligible influence over the course of the settlement,

entered the settlement under duress. Thompson's contribution totaled $3,096,597.22, and was made to this fund on June 22, 1984.

24) Thompson, as did each and every defendant in the case, denied liability in the final settlement agreement.

25) Approximately $3 million dollars was spent in legal fees in defense of Thompson in the Agent Orange litigation, including the time of Thompson's corporate counsel in monitoring the defense. The efficiency of Thompson's operations were diminished by the time necessary to monitor the defense, respond to the information requests, and inability to obtain financing.

BACKGROUND AS TO FINANCIAL IMPACT ON THOMPSON

26) Thompson's potential liability as to outstanding Agent Orange claims and other unknown contingent liabilities stemming directly from the Government's order to produce Agent Orange, and Thompson's payment of $3,096,597.22 in settlement fees, and approximately $3 million in legal fees and costs to the company of litigation, has seriously hindered Thompson's abilities to meet its financial obligations, causing serious and irreparable injury to Thompson's business reputation and reputation for credit-worthiness to such extent that Thompson was no longer able to continue as a viable business entity.

27) Thompson's reputation was further damaged as publicity regarding Thompson's participation in Agent Orange litigation created a public image directly contrary to the image and reputation of Thompson as a promoter of healthy, non-toxic products and positive, non-polluting environmental practices.

28) Prior to the Agent Orange litigation and subsequent settlement, Thompson was a profitable company grossing approximately $20 million in annual sales.

29) The financial cost to Thompson in settlement and legal fees created such a financial burden upon Thompson that Thompson was forced to dispose of all of its assets, including equipment, inventory, and its good will.

30) Thompson expended approximately $328,000 in addition to legal fees and costs in an effort to manage the corporate damage brought about by its production of Agent Orange and the subsequent litigation. Thompson spent in excess of $100,000 in order to dispose its assets.

31) Thompson had employed approximately 200 individuals, of whom 150 lost their jobs as a direct result of Thompson's financial difficulties and disposal of assets. The shareholders of Thompson lost their entire investment in Thompson, totaling between five and six million dollars, due to economic injury sustained by Thompson as a result of the manufacture of Agent Orange.

32) The manufacture of Agent Orange by Thompson was at all times performed at the St. Louis, Missouri facility. By-products of the manufacture of Agent Orange were disposed of at the Thompson Chemical/Superior Solvents site (hereinafter referred to as "Thompson site") at 60 Chouteau Avenue, St. Louis Missouri near the St. Louis facility.

33) The by-products disposed of were those resulting from Thompson's strict adherence to the terms of the '8712 and '6250 contracts. The Government had information superior to Thompson as to the toxicities, health risks, and environmental fate of these by-products.

34) Thompson faces potential liabilities as to the costs of clean-up of the Thompson Chemicals/Superior Solvents site or other potential claims as to damages resulting from such disposal as was required by the Government in order to perform the '8172 and '6250 contracts which the Government compelled Thompson to perform.

FIRST CLAIM FOR RELIEF

(Breach of Warranty)

35) Thompson repeats and re-alleges each and every allegation set forth in paragraphs 1 through 26 of this Complaint.

36) The Government promulgated, approved and established specifications for the manufacture of Agent Orange and ordered Thompson to produce Agent Orange in strict compliance with those specifications.

37) The Government impliedly warranted that if the Government's specifications were complied with, the product so produced would be free of all defects.

38) By virtue of the manufacture and delivery of Agent Orange by Thompson to the Government and the Government's breach of its warranty that compliance with Government specifications would result in the production of a product free from defects, Thompson suffered damages including, *inter alia*, serious diminution in the economic value of the business, including future claims deriving from Thompson's manufacture of Agent Orange, payments to claimants in the *Agent Orange* litigation, and defense fees and costs.

39) By reason of the foregoing, the United States is liable for all such damages sustained by Thompson.

SECOND CLAIM FOR RELIEF

(Breach of Contract to Indemnify)

40) Thompson repeats and re-alleges each and every allegation set forth in paragraphs 1 through 31 of this Complaint.

41) Thompson was ordered to produce Agent Orange pursuant to the Defense Production Act, 50 U.S.C. App. §§ 2051 et seq.

42) Pursuant to Section 2157 of that Act, the Government impliedly promised to indemnify Thompson for any liabilities incurred in performing under the Defense Production Act.

43) In performing the '8712 and '6250 Contracts, Thompson fully complied with the requirements of the Defense Production Act.

44) As a direct consequence of the Government's breach, Thompson suffered damages, including, *inter alia*, serious diminution in the economic value of the business, including future claims deriving from Thompson's manufacture of Agent Orange, payments to claimants in the *Agent Orange* litigation, and defense fees and costs.

45) By reason of the Act, the Government is liable to Thompson for all such damages sustained by Thompson.

THIRD CLAIM FOR RELIEF

(Misrepresentation)

46) Plaintiff Thompson repeats and re-alleges each and every allegation contained in paragraphs 1 through 37 of this Complaint.

47) Prior to issuing the Agent Orange specifications to Thompson contained in the Contracts, the Government had superior knowledge about the potential health risks caused by the manufacture, disposal, and application and other uses of Agent Orange.

48) The Government had a duty to disclose to Thompson its information about these health risks.

49) The Government breached its duty by its failure to disclose its information about these health risks to Thompson.

50) As a direct and proximate result of the Government's breach of its duty to disclose these material facts,

Thompson suffered damages, including *inter alia*, serious diminution in the economic value of the business, including future claims deriving from Thompson's manufacture of Agent Orange, payments to claimants in the *Agent Orange* litigation, and defense fees and costs.

51) By reason of the foregoing, the Government is liable to Thompson for all such damages sustained by Thompson.

FOURTH CLAIM FOR RELIEF

(Unconstitutional Taking)

52) Plaintiff Thompson repeats and re-alleges each and every allegation set forth in paragraphs 1 through 43 of this Complaint.

53) The mandatory requirement that Thompson produce Agent Orange and produce Agent Orange in compliance with the Defense Production Act of 1950, which compliance subsequently resulted in Thompson incurring liability to claimants in the *Agent Orange* litigation, together with the Government refusal to compensate Thompson, constitutes a taking of Thompson's property without due process. Accordingly, Thompson is entitled under the 5th Amendment of the Constitution of the United States to just compensation therefore.

RELIEF

WHEREFORE, Thompson demands judgment against defendant United States of America as follows:

1. Damages in the amount of $3,096,597.22 for settlements paid to Agent Orange claimants;

2. Damages in the amount of $3 million for attorneys fees, costs and expenses paid in defense of the Agent Orange litigation;

3. Damages for economic injuries caused by the order to produce Agent Orange, including but not lim-

ited to lost business, business reputation, serious diminution in the economic value of the business, and future claims based upon Thompson's manufacture of Agent Orange;

4. Attorneys fees and expenses incurred in this action;

5. Costs of this action;

6. Such other further relief as this Court may deem just and proper.

Dated: October 17, 1990

Respectfully submitted,

/s/ James S. Turner
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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES CLAIMS COURT

No. 90-496C

(Filed: Jun. 14 1991)

HERCULES INCORPORATED

v.

THE UNITED STATES

ORDER

The defendant's motion, filed on February 6, 1991, for a protective order staying discovery pending a decision on its dispositive motion is allowed until 30 days after the decision on the dispositive motion is filed.

IT IS SO ORDERED.

/s/ Robert J. Yock
ROBERT J. YOCK
Judge

[Filed Under Seal]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MDL No. 381 (JBW)

79-C-467	CV-80-2997	CV-81-991	CV-82-1142
79-C-747	CV-80-3256	CV-81-995	CV-82-1749
79-C-2752	CV-80-3336	CV-81-1199	CV-82-2004
79-C-2846	CV-80-3386	CV-81-2339	CV-83-1306
CV-80-0275	CV-81-512	CV-81-2721	CV-83-2022
CV-80-0613	CV-81-666	CV-82-3106	CV 83-4024
CV-80-0693	CV-81-1036	CV-82-0208	CV-83-4030
CV-80-0991	CV-81-559	CV-82-861	CV-84-1222
CV-80-1277	CV-81-1296	CV-82-1849	CV-84-1879
CV-80-1989	CV-81-2719	CV-82-1734	CV-84-1880
CV-80-2002	CV-81-511	CV-82-1852	
CV-80-2010	CV-81-522	CV-82-2493	
CV-80-2207	CV-81-665	CV-83-3122	
CV-80-2280	CV-81-1295	CV-82-0783	
CV-80-2284	CV-81-2349	CV-82-4033	
CV-80-2440	CV-81-2726	CV-82-775	
CV-80-2631	CV-81-519	CV-82-2179	
CV-80-2908	CV-81-662	CV-82-3619	

IN RE "AGENT ORANGE"

PRODUCT LIABILITY LITIGATION

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON THE GOVERNMENT CONTRACT DEFENSE

I. INTRODUCTION

For over five years, the defendants have unabashedly promoted a compelling account of herbicide manufacturers "acting under compulsion of federal law in pa-

triotic furtherance of the Vietnam War effort," supplying a necessary, effective and unique military weapon that met, in every respect, the Government's detailed specifications and expectations. 506 F. Supp. 737, 795 (E.D. N.Y. 1980). Drawing upon such themes as "compulsion to manufacture", "a product invented by the government", "absence of defendants' negligence", absence of any defect in their product", "defendants' compliance with the terms of the contracts and the governments' specifications", and "parity of knowledge apropos any health hazards associated with the use of their product," defendants now declare that they are entitled to summary judgment because they have satisfied all elements of the government contract defense.

Judge Pratt's rulings provided a powerful incentive for defendants to identify only that evidence which might support their version of the relevant events—a complete defense to all claims asserted against them. 534 F. Supp. 1046, 1055 (E.D. N.Y. 1982). They have provided this one-sided story up until now without meeting significant opposition. Indeed, defendants have done all they could to prevent such opposition.

Only days before defendants' answers to the United States' first discovery requests in the history of this litigation were due, the defendants moved for and secured, *ex parte*, a stay of all discovery. As defendants were well aware, the information sought by this discovery directly related to the factual issues which lie at the heart of the government contract defense, and which have not yet been presented to this Court. They also knew that, had defendants honored their discovery obligations, they ran the risk of revealing facts which would significantly undercut their motion for summary judgment.

Thus believing themselves secure from the threat of a factual assault upon their singular version of the defoliation program, defendants wasted no time in moving this

Court for a declaration that there are no genuine issues of material fact relating to the government contract defense, and that they were entitled to summary judgment as a matter of law.

The United States contends that there exists substantial and convincing evidence that establishes not only that there are indeed genuine issues of material fact directly bearing upon the validity of each and every contention relating to the government contract defense, but also that the defense does not further the policies it purports to serve, particularly in light of the facts presented here.

Accordingly, defendants' motion for summary judgment should be denied, insofar as it is premised on the government contract defense.

II. THE POLICY CONSIDERATIONS UNDERLYING THE GOVERNMENT CONTRACT DEFENSE ARE INAPPLICABLE TO THE FACTS AT BAR

A. By Virtue Of Pre-Trial Order 91, The Rationale For The Application Of The Government Contract Defense No Longer Exists.

In 1980, the defendants moved for summary judgment based upon what has been termed the "government contract defense." They argued that liability may not be imposed upon them for injuries arising out of the United States' use of Agent Orange, because (1) they merely manufactured and supplied Agent Orange to the government pursuant to contracts; (2) Agent Orange was not manufactured before and has not been manufactured since; (3) they completed their compelled manufacture of Agent Orange in strict compliance with the specifications supplied by the government, specifications that contained no obvious defects which would have alerted them to any danger in following them; and (4) they manufactured Agent Orange without any negligence on their part. 506 F. Supp. 762, 795 (1980).

By Order and Memorandum of the Court dated December 29, 1980 the Court granted the United States' Motion to Dismiss the third-party complaints in accordance with the rules of *Feres v. United States*, 340 U.S. 135 (1950), and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). The Court also recognized that "a government contract defense exists and has possible application to the facts at bar." 506 F. Supp. at 796.

The Court observed that considerations of fairness and public policy underlie the government contract defense. First, the Court found that tort liability principles seek to impose liability on the wrongdoer who caused the injury, not "the otherwise innocent contractor whose only role * * * was the proper performance of a plan supplied by the government." 506 F. Supp. at 793. Second, the Court found that "the policy considerations that lend continued vitality to government immunity argue for 'extension' of that freedom from liability to some government contractors." 506 F. Supp. at 794.[1] Uppermost in the Court's mind was the second rationale: its concern that the Government be permitted to conduct its military affairs unhampered by judicial scrutiny:

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[1] The United States takes strong exception to any theory of "shared" sovereign immunity. As the Supreme Court has held: "The government does not become the conduit of its immunity in suits against its agents or instrumentations merely because they do its work. * * * For more than a hundred years corporations have been used as agencies for doing work of the government. But this would not confer on such corporations legal immunity. . . ." *Keifer and Keifer v. R.F.C.*, 306 U.S. 381 (1938); *Sloan Shipyards v. U.S. Fleet Corp.*, 258 U.S. 549, 567 (1921). Furthermore, "the doctrine of sovereign immunity may not be extended to cover the fault of a private corporation, no matter how intimate its connection with the government." *Foster v. Day and Zimmerman, Inc.*, 302 F.2d 867 (8th Cir. 1974). *See also Witaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969) (government contractor not entitled to sovereign immunity).

> The purpose of a government contract defense in the context of this case is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, *are uniquely questions for the military and should be exempt from review by civilian courts.* As indicated in the text, considerations of public policy require that a supplier of weapons to the government has two duties: (1) to comply with the specifications imposed by the government, and (2) to see that the government is apprised of any risks or hazards related to the weapon of which the supplier has knowledge. Given those two conditions, a supplier to the government under specifications established by the government, is exempt from liability. . .

534 F. Supp. at 1054 (emphasis added). The defense, it has been argued, was intended to reduce the risk to national security that might exist if either the contractors or the courts were put in the position of second-guessing the design and deployment of military equipment. *Johnston v. United States*, 568 F. Supp. 351, 357 (D. Kan. 1983); *McKay v. Rockwell International Corp.*, 704 F.2d 444, 449-450 (6th Cir. 1983). *See also, Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982).

On February 16, 1984 the Court "tentatively" ruled that it was not inappropriate for a federal court to second-guess military decisions during time of war, concerning whether, when, and how to use particular war material in combat support, at least insofar as it concerned the so-called "independent" claims of wives and children. 580 F. Supp. 1242. Rejecting Judge Pratt's

analysis, this Court decided that the immunity afforded by the *Feres/Stencel* doctrines would not reach these "independent" claims. Assuming for the sake of argument the correctness of this Court's decision, at least two of the Court's original rationales for the government contract defense no longer exist: second-guessing of military decisions and avoiding the "unfairness" of having the "innocent contractor" bear the expense of the government's wartime decisions. Indeed, this Court appreciated the implications of its finding:

> By arguing for both the application of the government contract defense and for the abolition of *Stencel*, the defendants have taken somewhat inconsistent positions: the government contract defense is premised, in large part, on the argument that it is unfair to hold defendants liable for acts that were done at the government's behest since the government itself is immune from liability. If defendants' argument to disregard *Stencel* is accepted, the government will not be immune and thus the rationale for the application of the government contract defense largely disappears. *McKay v. Rockwell International Corp.*, 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984).

580 F. Supp. at 1247.

The United States submits that defendants may reap the "benefits" of Pretrial Order 91 *only* at the expense of losing the government contract defense.

B. The Alleged Injury-Causing Aspect Of The Product Was Neither Mandated Nor Even Contemplated Under the Terms of the Contracts

As a matter of public policy and simple logic, if the government contract defense should ever apply at all, it should only apply where the contract mandated the injury-causing aspect of the product. *Johnston v. United States*, 568 F. Supp. at 356; *Brown v. Caterpillar Tractor*

Company, 696 F.2d at 252.[2] It is beyond dispute that the alleged injury-causing aspect of Agent Orange was the presence of "dioxin", the presence of which was exclusively determined by the defendants' manufacturing processes.

That being the case, clearly the government contract defense has no application to these facts. First, dioxin was neither sought, referenced or even anticipated in any contract between the United States and the defendants.

Second, at no time during the history of the United States' procurement of the herbicides did it impose a *process* specification on the manufacturers. In fact, the industry documents clearly reflect a concerted effort to maintain absolute secrecy concerning their proprietary process for producing 2,4,5-T, the only component of Agent Orange in which dioxin is implicated. Exhibit 1.

Third, while the same basic government purchase descriptions applied to all manufacturers, the manufacturing process varied substantially from manufacturer to manufacturer, as did the levels of dioxin in the products supplied to the government.

Fourth, at least two defendants sought summary judgment before Judge Pratt based upon the relatively low levels of dioxin in their product. 565 F. Supp. 1263

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[2] For example, the United States Department of Commerce Task Force on Product Liability, under the chairmanship of Professor Victor E. Schwartz, has promulgated a Uniform Product Liability Law (reprinted at 44 Fed.Reg. 62714) (1979), which codifies the government contract defense at section 108:

> (c) When the *injury-causing aspect* of the product was, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, this shall be an absolute defense . . . .
>
> (d) When the *injury-causing aspect* of the product *was not*, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, the product shall be deemed defective. . . . (emphasis added).

(E.D. N.Y. 1983). Judge Pratt found that one of these defendants, Hercules, Inc. produced a produce that was "free of any detectable dioxin." *Id.* at 1276.

Fifth, the evidence developed thus far indicates that, while the techniques to reduce the levels of dioxin may have been available, defendants regarded the techniques as proprietary, and did not share the knowledge with their competitors. Thus, the defendants themselves have demonstrated not only that the alleged injury-causing aspect of the product was not mandated by the contracts, but also that the higher levels of dioxin were not necessary. Quite simply, the defendants were not compelled by the contracts to produce a product containing the defect at issue in this case. Thus, the fairness rationale of the government contract defense disappears. Protecting the "innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government" is unwarranted under the circumstances.

C. The United States Did Not Compel Defendants To Manufacture Agent Orange

Since the beginning of this litigation, the defendants have alleged that the United States "compelled" the defendants to produce Agent Orange using, *inter alia*, the mandatory provisions of the Defense Production Act (50 U.S.C. App. 2061 *et seq.*). Judge Pratt observed that, underlying the government contract defense, are considerations of "fairness and public policy." 506 F. Supp. at 793.

> Where, as here, manufacturers claim to have been compelled by federal law to produce a weapon of war without ability to negotiate specifications, contract price or terms, the potential for unfairly imposing liability becomes great.

506 F. Supp. at 794.

Judge Pratt did not establish "compulsion" as one of the triable issues relating to the government contract defense. Nevertheless, it is clear that the Court weighed heavily the defendants' heretofore uncontradicted representations in deciding whether to permit a government contract defense at all. 506 F. Supp. at 794-795. Unreflected in Judge Pratt's decision, however, was the fact that the element of compulsion never existed. Indeed, not only did the defendants voluntarily contract to produce Agent Orange, but some manufacturers also zealously promoted their capacity to produce herbicides for the United States, and vigorously competed for the opportunity to do so. Exhibit 2.

It is also difficult to comprehend defendants' contention of "compulsion", given that the product at issue was merely an adaptation or copy of a product which defendants were promoting and marketing in private commerce. Exhibit 3. Furthermore, as indicated above, since the defendants expressly considered the presence of dioxin in Agent Orange in connection with a manufacturing process which the United States did not specify and over which it had no control, the notion of compulsion makes no sense as applied to the alleged defect in the product. Finally, the defendants frequently urged changes in the formulation of Agent Orange concerning, for example, its purity and chemical composition. *See* Exhibits 4 and 5. This hardly indicates compulsion. In fact, the evidence which has long been available to the defendants and to the plaintiffs reveal that profit, and not compulsion or patriotism, caused defendants to contract to produce herbicides for use in Vietnam.

First, it is a matter of public record that the defendants produced Agent Orange *voluntarily* for years *before* the United States invoked the provisions of the Defense Production Act. In fact, the Act was only invoked for seventeen months. Exhibit 6. Second, the Act did not compel production of Agent Orange. Rather, it merely directed

defendants to accelerate and prioritize existing monthly production rates. *Id.* Third, at the time the Office of Industrial Mobilization of the Department of Commerce issued its directives to each of the producers of Agent Orange, the directive required the companies to notify the Business and Defense Services Administration if they were unable to accelerate production as directed. The Department of Commerce reports that its files do not reveal that any company which was directed to accelerate production appealed to that Department on the basis that the company did not produce the herbicide or could not increase production. *Id. See also* Exhibits 7 and 8.

As an example of the defendants' misdirection of the Court, The Dow Chemical Company has been one of the more outspoken manufacturers on the subject of compulsion. *See*, for example, Haines, *Agent Orange Liability of Federal Contractors*, 13 Toledo L. Rev. 1271, 1278 (1982) (Haines is an associate general counsel to The Dow Chemical Company). However, ample evidence demonstrates the eagerness with which Dow voluntarily associated itself with the herbicide program through contract. A sampling of the relevant evidence of which the Court should be aware lays bare the misconceptions which Dow has promoted over the years:

1. *EXHIBIT*: 9

   DATE: April 30, 1963

   AUTHOR: V.K. Rowe/Dow

   ADDRESSEE: Dr. B.P. McNamara/U.S. Army

   SUBJECT: Dow provides the name of satisfied customers who have been applying 2,4-D and 2,4,5-T in various forms for many years.

2. *EXHIBIT*: 10

   DATE: February 5, 1965

   AUTHOR: K. Hanson/Dow

   ADDRESSEE: J.L. Spalding/Patent Department

   SUBJECT: Dow actively bids for herbicide contracts with the military, and seeks "royalties due Dow Chemical" for Agent Purple (50% n-butyl ester or 2,4-D, 30% n-butyl ester of 2,4,5-T, 70% isobutyl ester of 2,4,5-T).

3. *EXHIBIT*: 11

   DATE: September 9, 1966

   AUTHOR: Dr. C.E. Minarik/U.S. Army

   ADDRESSEE: Memorandum For Record

   SUBJECT: Dow develops and proposes a new formulation of herbicide for use in Vietnam, and attempts to sell it to the military.

4. *EXHIBIT*: 12

   DATE: September 15, 1966

   AUTHOR: Dr. C.E. Minarik/U.S. Army

   ADDRESSEE: Memorandum For Record

   SUBJECT: Dow offers a replacement for Agent Orange and offers the Army 5000 gallons free for testing in Vietnam or Thailand. The offer was declined.

5. *EXHIBIT*: 13

   DATE: October 7, 1966

   AUTHOR: Dr. C.E. Minarik/U.S. Army

   ADDRESSEE: Memorandum For Record

   SUBJECT: Dow is said to be "pressuring" the military to accept their new formulation of Agent Orange for evaluation in Vietnam.

6. *EXHIBIT*: 14

   DATE: August 11, 1966

   AUTHOR: Dow

   ADDRESSEE: Internal Memorandum

   SUBJECT: Dow is ready, willing, and able to produce Agent Orange for the military. Dow says it would be "willing and happy" to deny the civilian market Tordon for 1967 "if it could get a firm commitment from the military soon".

7. *EXHIBIT*: 15

   DATE: February 14, 1967

   AUTHOR: C.E. Minarik/U.S. Army

   ADDRESSEE: Memorandum For Record

   SUBJECT: Dow urges military to acquire Tordon 101, a commercial product, for use in Vietnam.

*8. *EXHIBIT*: 16

DATE: February 24, 1967

AUTHOR: A.P. Beutel, Vice President/Dow

ADDRESSEE: General J.A. Hebbeler/U.S. Army

SUBJECT: Dow urges against Army's consideration of a plan to convert the Phosphate Development Works, Alabama, to produce Agent Orange. Instead, Dow touts its own capabilities to produce Agent Orange, and argues that if the military would turn to Dow, "*the military's needs would be met for less* capital outlay and, in addition, production would be realized at a much earlier date". Dow concludes that it *"is in an excellent position to move ahead with a substantial expansion of tetrachlorobenezene, trichlorophenol, and Orange."*

*9. *EXHIBIT*: 2

DATE: March 29, 1967

AUTHOR: R.A. Hickman, Mgr. U.S. Government Marketing/Dow

ADDRESSEE: Wesley Koster/Department of Commerce.

SUBJECT: Dow notes that it has been actively engaged in the production of herbicides for twenty-five years. Of particular interest, the letter reveals that *"as early as the Korean War chemicals provided by the Dow Chemical Company were*

used in defoliation work." Dow states that it had been providing the military with Agent Orange since 1965, two years prior to the invocation of the Defense Production Act. Dow also reports that "*we have sent personnel to Vietnam; we have supplied thousands of dollars of research and development, time and effort; and we have, perhaps more than any other industrial company cooperated very closely with field personnel in Vietnam . . .*" Finally, the company that would have this Court believe that it was compelled to produce herbicides for use in Vietnam, states: "Dow can supply X gallons of Orange every three months. *However, in order to meet this commitment, it will be necessary to have contracts awarded by the Government immediately.*"

10. *EXHIBIT*: 17

DATE: August 18, 1967

AUTHOR: R.A. Hickman/Dow

ADDRESSEE: Internal Memorandum

SUBJECT: Dow was not compelled to produce Agent Orange; only to accelerate existing levels: "We were given *permission*, in fact, *we were requested*, to accelerate the shipments of both Orange and and Tordon *under our present contracts.*"

11. *EXHIBIT*: 18

DATE: January 23, 1968

AUTHOR: George Collins/Defense Supply Agency

ADDRESSEE: Command Officer (SAAMA)

SUBJECT: Dow proposes changes in specifications for Agent Orange.

*12. *EXHIBIT*: 19

DATE: July 17, 1968

AUTHOR: A.P. Beutel/Vice President, Dow

ADDRESSEE: General Hebbelor/U.S. Army

SUBJECT: Dow vigorously touts its "Super Orange" to the military: "The Dow Chemical Company presented to various governmental agencies the advantages of Super Orange as a better herbicide for use in Vietnam. * * * Included with the data was a proposal for 100,000 gallons or less of Super Orange to be supplied by Dow . . . ." Dow offers 8,000 gallons of Super Orange at *no cost* to the Government in order to expedite an experiment."

Of particular interest, to extend the applicability of this discussion beyond Dow, are the October 4, 1968 minutes of defendants' meeting on "Weldon Springs", the government's intended Agent Orange manufacturing plant. Representatives of Monsanto, Hercules, Thompson-

Hayward and Hooker attended the meeting. Thompson was not invited.[3]

These defendants feared that if the United States might elect to construct and place into operation an Agent Orange plant at Weldon Springs, there was a risk of "very substantial overproduction" if [the plant] is operated at full capacity", which might then be directed for domestic sale, thereby infringing upon or competing with their own domestic market. Accordingly, these defendants formed a task force, appointed a chairman, and conspired to defeat the project:

> "At best we hope to prevent completion of the Weldon Springs plant or at least confine its production to only that amount of T or D needed by the Government, but unavailable from industry. . . . [t]here is sufficient domestic production of 2,4-D to fully meet both the civilian and military requirements, and that the production of 2,4,5-T would meet a substantial part of both the civilian and military need."

Exhibit 20.

Documents demonstrating defendants' freedom to influence the specifications for Agent Orange, including those for purity, volume, chemical composition, weight, acidity, appearance, *quality*, *inspection and testing proce-*

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[3] While counsel for Thompson Chemical Company have consistently characterized their client as a small-time and reluctant manufacturer, it is a matter of public record that Thompson voluntarily and successfully bid against four other manufacturers for the chance to produce Agent Orange at Weldon Springs. This is hardly indicative of compulsion.

It is also noteworthy that the Director of Product Sales at Monsanto, another company who claims compulsion, recently testified that Monsanto "wanted to sell as much as we could in response to the government request. * * * The government was a good customer." Deposition of William J. McCarville. Exhibit 21.

dures, and defendants' absolute discretion over the manufacturing process, are legion. Compulsion, quite simply, did not exist.

D. Agent Orange Was A Simple Adaptation Or Copy Of Products Already Sold Commercially

As discussed above, one of the rationales for the government contract defense is that it reduces the risk to national security that might exist if either contractors or the courts were put in the position of second-guessing the design of military equipment. Citing *Agent Orange*, the Ninth Circuit explained that:

> In setting specifications for military equipment, the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods. A supplier is frequently unable to negotiate with the United States to eliminate those risks.

McKay v. Rockwell, 704 F.2d at 450. *Agent Orange*, 506 F. Supp. at 794. But as the Court in *Johnston* observed:

> When the product in question is a new and technically complex one used only by the military—such as the ejection seat in McKay—the rationale has some force, *but when the product is a simple adaptation or copy of one already sold in private commerce * * * it does not.*

568 F. Supp. at 357 (emphasis added). *See also Plas v. Raymark Industries, Inc.*, No. C78-946 (N.D. Ohio, May 3, 1983) (the government contract defense is stricken because the asbestos materials sold to the government were the same as those sold generally to the private sector); *Chapin v. Johns-Manville*, No. S79-

0272N (S.D. Miss. January 1982) (The government contract defense not available where product is produced for general usage). Exhibits 22 and 23, respectively.

It is therefore hardly surprising that, from the outset of this litigation, defendants characterized Agent Orange as some unique military weapon. 506 F. Supp. 794. But Judge Pratt had been misled. Consider some of the defendants' recent pronouncements:

1. "The herbicides comprising Agent Orange have been effectively used in the United States without adverse health effects for more than 40 years." Hercules' Post Settlement News Release. Exhibit 24.

2. "During the period 1947 through 1963 more than three hundred million pounds of 2,4,-D and 2,4,5-T were produced and used to control vegetation on more than four hundred million acres of land in the United States." Memorandum of Defendant Hercules In Support Of Motion For Summary Judgment on The Government Contract Defense, dated April 20, 1983, at 11.

3. "2,4,-D and 2,4,5-T were used commercially for fifteen years without incident before their formulation into Agent Orange." Defendants' Fairness Brief.

There can be no serious dispute that the herbicides defendants sold to the government were essentially the identical herbicides which the defendants and others were marketing commercially. *See* Declaration of Dr. Alvin Young, Ph.D., Senior Policy Analyst for Life Sciences, Executive Office of the President. Exhibit 3. Indeed, not only did defendants market the component herbicides of Agent Orange, but they also marketed 50:50 mixes of the herbicides virtually identical to Agent Orange. The rationale of preventing unfair visitation of tort liability upon "innocent" manufacturers who were compelled to

produce an inherently unsafe product because of the exigencies of war, is simply inapplicable to the facts at bar. After all, who would know more concerning the properties of Agent Orange, than the manufacturers who developed and marketed its constituent products for public consumption? This is not a situation where the government thrust upon a manufacturer mandatory specifications for a product which would not have otherwise been produced.

Accordingly, the government contract defense should not be available to the defendants.

E. The Evidence Available Thus Far Is Sufficient To Support A Finding That The Manufacturers Of Agent Orange Were Negligent Or That The Product They Supplied To The United States Was Defective

It is generally recognized that, to invoke the government contract defense, a defendant must not have acted in a negligent manner. The defense does not shield suppliers of military equipment from liability for defects in the manufacture of the equipment.[4] Thus, each defendant should be held liable if it negligently designed or manufactured the product it delivered to the government.[5]

Where (1) all of the defendants were called upon to produce an identical product; (2) the same performance

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[4] *McKay v. Rockwell International Corp.*, 704 F.2d at 451; *Whitaker v. Harvell Kilgore Corp.*, 418 F.2d 1010, 1018 (5th Cir. 1969); *Brown v. Caterpiller Tractor Co.*, 696 F.2d at 250; *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F. Supp. 447, 451 (S.D. N.Y. 1964); *Foster v. Day and Zimmerman*, 502 F.2d 867, 874 (8th Cir. 1974); *Merritt Chapman and Scott Corp. v. Guy Atkinson Co.*, 295 F.2d 1416 (5th Cir. 1961).

[5] Plaintiffs' actions against the defendants specifically allege negligent design, manufacture, and the failure to warn of latent defects.

requirements applied to all of the defendant-manufacturers; (3) the presence of dioxin was determined solely by the manufacturing process; (4) the terms of the contract made no provision for a particular manufacturing process or for the presence of dioxin; (5) the government exercised no control whatsoever over the manufacturing process; (6) the defendant-manufacturers exercised absolute discretion over the manufacturing process; (7) the defendants expressly considered the presence of dioxin in their product, and unilaterally determined the levels of the contaminant; (8) the terms of the contracts provided that inspection and quality assurance were the responsibility of the manufacturer; (9) the levels of dioxin varied substantially depending upon the manufacturer; and (10) the defendants demonstrated that the levels of dioxin in their product could have been reduced, there arises a presumption or inference sufficient to support a finding that the manufacturers were in fact negligent or that the product they supplied to the government was defective.[6]

Accordingly, the defendants should not enjoy the benefit of the government contract defense.

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[6] Pursuant to the terms of the express warranty provisions of the relevant contracts, the defendants agreed to supply chemicals that would be free from defects in design, materials or workmanship. Exhibits 25 and 26.

III. IMPOSING LIABILITY ON GOVERNMENT CONTRACTORS FOR DEFECTIVE OR NEGLIGENTLY PRODUCED PRODUCTS WOULD SERVE THE IMPORTANT POLICIES UNDERLYING NEGLIGENCE AND STRICT LIABILITY THEORIES AND WOULD NOT UNDERCUT MILITARY DECISION-MAKING OR COST-EFFICIENT GOVERNMENT PROCUREMENT

A. Liability For Government Manufacturers Promotes Safe Products, Pools The Risk Of Hazardous Products, And Relieves The Innocent Victims Of Heavy Unanticipated Burdens

Judge Pratt correctly observed that tort liability seeks to impose the burdens of the injury on the responsible party. 506 F. Supp. at 793. He also correctly noted that deterrence and safety are important underlying policies of tort law, and that these policies would not be served by imposing liability upon a government contractor who has no control whatsoever over the development, design, manufacture, and use of a product. *Id.* However, where a government contractor dominates the development of the product and the design of its specifications or has significant discretion in manufacturing the product—all which apply here—the policies in support of imposing tort liability, including strict liability, remain in full force.

When a manufacturer designs and develops a commercial product, it usually has the expertise to make the product either more or less safe. *Greenman v. Yuba Power Co.*, 27 Cal. Rptr. 697 (1962); *Wachtel v. Rosol Construction Co.*, 34 Conn. Supp. 204, 207 (1978). The herbicides sold to the government were marketed commercially *before* and *during* sale to the government. In producing a product that allegedly met government specifications, defendants enjoyed *absolute* discretion over the

manufacturing process. Defendants concede that it was the manufacturing process alone that caused the presence of dioxin in the product furnished to the government. Negligence and strict liability provide incentives to choose practices or policies which enhance safety. Applying the government contract defense, under the circumstances presented here, eliminates important deterrence to unsafe, indifferent, or even reckless conduct on the part of government contractors.

Another justification for imposing liability on manufacturers is that they can best pool the risk of harm resulting from their products. The social costs of the product will be spread among the producers and consumers of the product. *See, e.g., Greenman v. Yuba Power Products,* 27 Cal, Rptr. at 697. The manufacturers are in the best position to purchase liability insurance and they are free to adjust the price and profits of their product to reflect either the insurance or damage judgments resulting from the hazards of their product. Without liability, the costs of the hazards are borne solely by the victims of their conduct.

B. Imposing Liability On Government Contractors Will Not Interfere With Military Decision-Making Or The Government Procurement Process

Judge Pratt explained that the government contract defense is necessary to ensure that the government can easily obtain supplies and materials, and that national security might be comprised if a manufacturer or a court second-guessed military decision-making. 534 F. Supp. at 1054. However, government procurement and military decisionmaking would remain intact and unobstructed when the inquiry is focused upon the negligence of the supplier of commercial products, particularly when any inquiry into governmental liability should be foreclosed by sovereign immunity.

Imposing a duty to exercise reasonable care in the manufacture of a product or to warn of latent defects in products supplied to the government, will neither hinder the flow of supplies to the government nor interfere with the military's ability "to wage war in whatever manner the Government deems advisable." *Id.* This is hardly a situation in which a government specification commanded a particular manufacturing process or where the alleged injury-causing aspect of the product was mandated by contract. Contract compliance, quality assurance and inspections were the responsibility of the manufacturer under the express provisions of the herbicide contracts. The manufacturers' elimination of the dioxin in the product would not have involved "second-guessing" military decision-making, for there was no military decision for Agent Orange to contain dioxin.

As discussed above, the argument for a government contract defense is also weakened when a product is not manufactured exclusively for the military, but is, instead, commercially available and the government is just one of several consumers. *Chapin v. Johns-Manville Sales Corp., supra*; *Plas v. Raymark Industries, Inc., supra.*

C. The Government Contract Defense Cannot Be Justified As A Cost-Saving Measure

Some have argued that the government contract defense will increase the Government's cost of obtaining needed materials, but that is far from clear. The cost of liability insurance is often built into the bid submitted for a government contract. In fact government contracts often require the contractor to carry liability insurance. *See* Defense Acquisition Regulations (formerly Armed Services Procurement Regulations), 32 C.F.R. Section X, Parts 3-5. If insurance has already been acquired, then the government contract defense results in a windfall to the insurer at the expense of the plaintiffs.

The Supreme Court has recognized that government contractors set their bid prices to reflect the risk of pos-

sible liability. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. at 666. In *Stencel Aero*, the Court noted that there was no unfairness to government contractors in prohibiting an indemnity suit against the United States because the contractor "no doubt had sufficient notice as to take his risk [liability] into account in negotiating its contract . . . ." *Id.* at 674.

There is no reason to assume that the costs of insuring against liability are uniform for all military equipment suppliers. Those with proven safety records may be able to secure liability insurance at much lower rates than less careful suppliers. Presumably, such cost savings enabled these manufacturers to make lower bids and be more competitive. It is by no means clear, therefore, that the government contract defense will make government procurements more cost-efficient or even more efficient generally.

IV. THERE ARE GENUINE ISSUES OF MATERIAL FACT BEARING ON THE VALIDITY OF EACH AND EVERY CONTENTION RELATING TO THE GOVERNMENT CONTRACT DEFENSE

Defendants declare that they are entitled to summary judgment because all of the elements of the government contract defense have been established. The principles of summary judgment practice in the Second Circuit are very well established. *Cereali v. Continental Grain Co.*, 563 F.2d 563, 565 (2d Cir. 1977); *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975):

> [T]he "fundamental maxim" remains that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried. Moreover, when the Court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom sum-

> mary judgment is sought, with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. This rule is clearly appropriate, given the nature of summary judgment. This procedural weapon is a drastic device since its prophylatic function, when exercised, cuts off a party's right to present his case to the jury.

524 F.2d at 1319-1320 (citations omitted.)

A prerequisite to summary judgment is the absence of any genuine issues as to any material fact. *Bridgeport Brass Co. v. Bostwick Laboratories, Inc.*, 181 F.2d 315, 316 (2d Cir. 1950). Thus, "if liability is dependent upon any disputed questions of fact, the party opposing the motion has the right to have those questions determined upon a trial." *Id.* The Second Circuit has consistently held that summary judgment is a harsh remedy which should be exercised with care taken to give the parties an opportunity to develop the facts. *Shoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2d Cir. 1968); *Judge v. City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975). Trial by affidavits has consistently been condemned. *Poller v. Columbia Boradcasting Systems, Inc.*, 368 U.S. 465, 473 (1962). This is especially so where proof depends upon credibility. *Colby v. Klune*, 178 F.2d 872, 873-875 (2d Cir. 1949):

> This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared *ex parte*. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture.

178 F.2d at 872 (citations omitted).

Virtually all the discovery conducted in this litigation concerning the government contract defense occurred

prior to this Court's February 16, 1984 ruling restoring the United States to party status. The United States has never had an opportunity to question any witness whose deposition defendants now offer in support of their summary judgment. Indeed, only days before moving for summary judgment, defendants moved *ex parte* for an order staying all discovery indefinitely. The Order issued, and the United States' first opportunity to look behind defendants' allegations was lost. Nevertheless, it is doubtful that there has ever been a case less amenable to summary judgment on the government contract defense than the one presently before this Court. This aspect of the case abounds in genuine issues of material fact bearing directly on the validity of each and every contention relating to the government contract defense. For this reason, summary judgment on the government contract defense must be denied.

Judge Pratt ruled that a defendant in this case will be entitled to judgment dismissing all claims against it based on that defendant's having supplied Agent Orange to the government pursuant to contract, if the defendant proves:

1. That the government established the specifications for Agent Orange;
2. That the Agent Orange manufactured by the defendant met the government's specifications in all material respects; and
3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of Agent Orange.[7]

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[7] Elaborating on the knowledge element, Judge Pratt stated that a defendant could not avail itself of the defense if it "was aware of hazards that might reasonably have affected the government's decision about the use of Agent Orange," *Id.* at 1058, "and failed to disclose them to the government, *Id.* at 105. Defendants incorrectly state, that this Court redefined this element in terms of whether "the government knew *roughly* what the defendants' knew." Defendants' Memorandum at 45.

While defendants have invested millions of dollars developing those facts which would tend to support the government contract defense, they have skillfully avoided the evidence which demonstrated the inapplicability of the defense, and the need for more discovery. Nevertheless, evidence exists that, contrary to defendants' assertions, they have not made out a single one of the elements of the government contractor defense.

A. Whether The Government Established The Specifications For Agent Orange Involves Genuine Issues Of Fact [8]

Defendants contend that "plaintiffs have not seriously questioned that the government established the specifications for Agent Orange, and that the Agent Orange met the government's specifications in all material respects." Defendants' Memorandum at 49. While it is not at all clear why the plaintiffs would essentially concede two of the three elements of a complete defense to their action, suffice it it say, defendants have hardly established proof sufficient to support a summary judgment. In fact, inasmuch as the defendants cannot seriously deny that the presence and level of dioxin in Agent Orange was *unilaterally* determined by the individual manufacturers, the defense should not be available to the defendants. To permit the defense under the circumstances presented here, would subvert the policies underlying the defense. Nevertheless, assuming it is still relevant whether the limited states established the general specifications for the

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[8] Defendants will no doubt argue that the first two elements of the government contract defense have been established before Judge Pratt. First, the United States had been dismissed entirely from this lawsuit at the time defendants moved for summary judgment and, therefore, conducted no discovery and took no part in the summary judgment proceedings. Second, this Court has held that it will not be bound by Judge Pratt's findings concerning the government contract defense. Third, justice and fairness requires that this Court have the benefit of the best evidence available before proceeding with summary judgment.

two components of Agent Orange, the Court should consider the following evidence, which defendants chose not to present to the Court:

1. *EXHIBIT*: 27
   DATE: April 1967
   AUTHOR: Ernest R. Higgins/U.S. Army
   ADDRESSEE: Commanding General/Army Munitions
   SUBJECT: It is reported that "[a] variety of herbicides were procured off the shelf and shipped to VN." * * * "MILLIONS OF GALLONS OF THE HERBICIDE 'ORANGE' HAVE BEEN PROVIDED, ON AN UNCLASSIFIED BASIS, BY THE DEFENSE GENERAL SUPPLY AGENCY FOR THE U.S.A.F. THE SPECIFICATIONS USED IN THE PROCUREMENTS HAVE BEEN PROVIDED BY THE MANUFACTURERS OF THE PRODUCT AND CALL FOR A 50:50 MIX OF THE N-BUTYL ESTERS OF 2,4-D AND 2,4,5-T."

2. *EXHIBIT*: 4
   DATE: October 25, 1967
   AUTHOR: R. B. Scott/Hercules
   ADDRESSEE: W. E. Vanderventer/Air Force
   SUBJECT: Hercules supplies its proposed specifications for Agent Orange: "We believe these [specifications] are both practical and sufficiently rigid to be acceptable to industry and

to the government agency concerned."

3. *EXHIBIT*: 28
   DATE: June 1, 1962
   AUTHOR: Keith Barrons/Dow
   ADDRESSEE: J. R. Frank/U.S. Army
   SUBJECT: Dow supplies its specifications for 2,4-D and 2,4,5-T.

4. *EXHIBIT*: 5
   DATE: January 30, 1968
   AUTHOR: George Kampson/Monsanto
   ADDRESSEE: Edward Bartlett/U.S.A.F.
   SUBJECT: Monsanto's proposals concerning the specifications for Agent Orange.

5. *EXHIBIT*: 29
   DATE: January 29, 1964
   AUTHOR: U.S. Army Laboratories Proceedings of the First Defoliation Conference
   ATTENDEES: Herbicide Manufacturers, including a number of defendants.
   SUBJECT: Army turns to industry to supply a herbicide that will meet its military needs: "Ordinarily with military R & D we have a military concept that leads to the statement of a military requirement, technical characteristics, performance specifications, and other strictly delimited aspects. In this program, we do not have rigid speci-

fied characteristics. I have stated some of the broad requirements that a successful defoliating chemical should have, but with this general framework, we will accept and use materials that will do a job for us. In a few years, it may be that we will come up with more definite specifications, but at the moment, we simply solicit the assistance of you gentlemen in finding materials that can be used successfully with the reasonably broad and general guidelines. . . ."

6. *EXHIBIT*: 30
   DATE: May 2, 1983
   DEPOSITION: Cecil H. Russell/Monsanto
   SUBJECT: Monsanto wrote the specifications for Agent Orange: Q. Did you create the specifications for Orange I? A. I wrote it, my version of it. Q. Well, when you say you wrote your version of it, was not your version the one that was then incorporated into MIL specs? A. They were the same."

Even without an opportunity to conduct any discovery, it is apparent to the United States that defendants have brought forth only a small fraction of the relevant evidence on this issue, and certainly only the evidence which supports their contentions.[9] Evidence similar to that pro-

[9] The defendants have been successful in focusing the plaintiffs and the Court's attention to the issue of whether the government established the specifications for "Agent Orange." The United States suggests that the *only* relevant component of Agent Orange, for the purpose of this litigation, is 2,4,5-T. It is only 2,4,5-T

vided in this memorandum abounds, and needs to be considered by this Court before considering summary judgment. Considerable additional evidence will be provided once discovery is permitted.

B. Whether The Agent Orange Manufactured By The Defendants Met Government Specifications Involve Genuine Issues Of Fact

At the time the Court set forth this element of the government contract defense, it seems unlikely that the Court appreciated the complexity of this issue.[9] There are over sixty known contracts for the manufacture of herbicides containing 2,4,5-T for use in Vietnam, involving at least seven manufacturers, spanning a decade. Despite of defendants' assertions of strict compliance with the specifications, there is evidence that government in fact rejected individual batches of Agent Orange. For example, 8,200 gallons of Dow's product failed to meet the required blend ratio. Exhibit 31. Hercules sold defective Agent Orange to the government in July and August of 1967. In September, 1967 Hercules shut down its Jacksonville, Arkansas plant due to its inability to produce "on-spec" Agent Orange. Exhibit 32. Moreover, by the express terms of the contracts, compliance with the specifications, quality assurance, and inspections were the sole responsibility of the defendants.

By a procedural maneuver, the defendants have attempted to obtain summary judgment, while insuring that the United States would not discover evidence on these very issues. Nevertheless, it is clear that there are indeed genuine issues of material fact concerning defendants' compliance with terms of various government contracts.

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in which dioxin is implicated. There can be no dispute that defendants have dominated the production and marketing of 2,4,5-T commercially for at least a decade *before* they contracted to provide 2,4,5-T for use in Vietnam.

C. Whether A Defendant Was Aware Of Hazards That Might Reasonably Have Affected The Government's Decision About The Use Of Agent Orange And Failed To Disclose Them To The Government Involves Genuine Issues Of Fact

Once again, in formulating this element of the government contract defense, it is doubtful that the Court appreciated the potential factual complexity of the issue. In a context in which several defendants supplied herbicides at numerous times across an extended span of years, the evidence necessary for one or more defendants to establish the government contract defense might include the knowledge that one or another defendant had as compared to the knowledge the government had, at various points of time, concerning the alleged hazardous aspects of Agent Orange. The complexities of proof are exponentially compounded when the relative knowledge of the government and a particular defendant over a period of years is in turn linked to the varying time periods of exposure of multiple plaintiffs. In addition, with regard to the differing time periods concerning the exposure of each plaintiff, it appears that the specifications changed over time. Rather than attempting to address these difficult, though unavoidable, factual issues, defendants elected to pursue a deceptively simplistic course of seeking out obscure, isolated examples of "government knowledge" or the "government's opportunity to have obtained knowledge", in the hope of creating an overall impression of satisfying this element of the defense. In doing so, they failed to grasp the full, factual implications of the so-called "third" element of the defense and, consequently, have failed to establish the facts necessary to support the government contract defense.

Defendants also ask the Court to consider the fact that the United States has not had an opportunity to conduct discovery on this issue. The full measure of the

scope of the Government's relevant knowledge comes to the Court solely through the eyes of the manufacturers. Surely the United States must have an opportunity to be heard concerning the extent of its relevant knowledge. Still, the Court is invited to review information which the manufacturers chose *not* to share with the Government during the *relevant* time periods:

1. *EXHIBIT*: 33
   DATE: May 4, 1965
   AUTHOR: L.O. White/Dow
   ADDRESSEE: Internal Memorandum
   SUBJECT: Dow sets its own internal specifications for the level of dioxin in its 2,4,5-T.

2. *EXHIBIT*: 34
   DATE: June 22, 1965
   AUTHOR: Tiffany/Dow
   ADDRESSEE: Confidential Internal Memorandum
   SUBJECT: Dow establishes an analytic method for detecting 2,3,7,8-TCDD in 2,4,5-T by gas-liquid chromatography.

3. *EXHIBIT*: 35
   DATE: June 24, 1965
   AUTHOR: U.K. Rome/Dow
   ADDRESSEE: Ross Mullholland/Dow
   SUBJECT: Confidential letter concerning problems with chloracne: "As you well know, we had a serious situation in our operating plants because of contamination of 2,4,5-T with im-

purities, the most active of which is 2,3,7,8-TCDD. This material is exceptionally toxic. * * * If it is present in the trichlorophenol, it will be carried through into the T acid and hence into formulations which are to be sold to the public. One of the things which we want to avoid is the occurrence of any acne in consumers. I am particularly concerned here with persons who are using the material on a repeated basis . . . . *If this should occur, the whole 2,4,5-T industry will be hard hit and I would expect restrictive legislation, either barring the material or putting very rigid controls upon it.*

4. *EXHIBIT*: 36

   DATE: June 16, 1966

   AUTHOR: J.J. Ford/Analytical Div. Hercules

   ADDRESSEE: E.E. Christofano/Medical Dept. Hercules.

   SUBJECT: Internal Memorandum discussing the various levels of dioxin in its 2,4,5-T.

5. *EXHIBIT*: 37

   DATE: August 26, 1965

   AUTHOR: J.J. Ford/Hercules

   ADDRESSEE: M.A. Taves/Hercules

   SUBJECT: The analytical data obtained on the "dioxin" content of its 2,4,5-T.

6. *EXHIBIT*: 38
   DATE: March 30, 1965
   AUTHOR: A.F. Sidwell/Hercules
   ADDRESSEE: J.P. Frawley/Hercules
   SUBJECT: The formation of TCDD in its 2,4,5-T.

7. *EXHIBIT*: 39
   DATE: June 10, 1965
   AUTHOR: J.P. Frawley/Monsanto
   ADDRESSEE: V.K. Rowe/Dow
   SUBJECT: Discussion of techniques to identify dioxin in 2,4,5-T.

8. *EXHIBIT*: 40
   DATE: February 3, 1967
   AUTHOR: W.J. McCoy/Dow
   ADDRESSEE: V.K. Rowe/Dow
   SUBJECT: Discussion concerning competition between Dow and Thompson Chemical, and whether to honor Thompson's request for information concerning its "severe chloracne problems."

9. *EXHIBIT*: 1
   DATE: March 19, 1965
   AUTHOR: V.K. Rowe/Dow
   ADDRESSEE: Several Herbicide Manufacturers Including Hercules
   SUBJECT: Invitation to come to Dow "to discuss toxicological problems caused by the presence of certain highly toxic impurities in certain samples

of 2,4,5-T trichlorophenol and related material." * * * *"Our discussions will deal only with the toxicological and analytical aspects of the problem. We will not discuss manufacturing know-how, sales or anything else not dealing with the problem of health.* It is our hope that through this meeting, we will acquire a better understanding of the problems and that each company will then proceed independently as it sees fit to institute such self-imposed controls on its production as are necessary to insure the safety of its products."

10. *EXHIBIT*: 41
DATE: March 24, 1965
AUTHOR: E.L. Chandler/Diamond Shamrock
ADDRESSEE: Internal Memorandum
SUBJECT: Following the conference referenced above, Chandler concluded: ". . . The purpose of this meeting was obviously designed to help us solve this problem before outsiders confuse the issue and cause us no end of grief . . . ."

11. *EXHIBIT*: 42
DATE: July 9, 1965 (telephone call)
AUTHOR: J.P. Frawley/Hercules
ADDRESSEE: Memorandum on File
SUBJECT: Confidential notes of a telephone call concerning the acnegen problem with 2,4,5-T. "On July 9,

> 1965, Mr. Earl Farnham of Dow Chemical Company telephoned stating that he was calling at the request of Mr. Donald Balwin, Vice-President of Dow to inquire how serious I considered the chloracne problem in relation to the consumer use of 2,4,5-T. * * * [H]e stated that Dow had gone to great expense to alter their manufacturing conditions in order to produce 2,4,5-T acid which has less than 1 ppm acnegen. * * * *He then stated that Dow was extremely frightened that this situation might explode. They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this, the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation on manufacture of pesticides which might result. I advise Mr. Farnham that we shared his fear but are not aware of his allegation that the competitors' products were hazardous. He asked if Hercules had established an internal specification. I stated that he should discuss this with someone in our management . . . .*

This is but a fraction of the information which defendants chose *not* to share with their largest single herbicide customer during the relevant time periods—the United States Government. Whether such information

"might reasonably have affected the government's decisions" concerning whether and how to use Agent Orange surely involves genuine issues of fact. This last component of the defense is hardly amenable to summary judgment.

V. CONCLUSION

The government contractor defense should be rejected in this case because it would not further the policies it purports to serve. In addition, there are genuine issues of material fact exists which bears upon the validity of each contention relating to the defense.

Accordingly, defendants' motion for summary judgment on the government contractor defense should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HERCULES INCORPORATED

and

WM. T. THOMPSON COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

If the government orders manufacture by private companies of a product known to the government to be potentially dangerous, and the use by the government of the product causes the manufacturers to incur tort liability to third parties as well as defense costs, may the government claim immunity in a breach of contract case from the consequences of its conduct, notwithstanding the requirements of the *Spearin* doctrine and the Defense Production Act?

PARTIES TO PROCEEDING BELOW

All of the parties are listed in the caption. Pursuant to Rule 29.1, Petitioners make the following disclosures:

1. Hercules Incorporated has no parent company and has no subsidiaries or affiliates that are publicly traded.

2. Wm. T. Thompson Company has no parent company and has no subsidiaries or affiliates that are publicly traded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-818

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and

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v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR THE PETITIONERS

Hercules Incorporated ("Hercules") and Wm. T. Thompson Company ("Thompson") submit this brief and urge that this Court reverse and remand the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered on May 4, 1994.

OPINIONS BELOW

The opinion of the United States Court of Federal Claims (then the United States Claims Court) granting the government's motion for summary judgment against Hercules (Pet. App. 47a-80a) is reported at 25 Cl. Ct. 616. The opinion of that same court granting the government's motion for summary judgment against Thomp-

son (Pet. App. 82a-115a) is reported at 26 Cl. Ct. 17. The divided opinion of the Federal Circuit affirming the Claims Court (Pet. App. 1a-46a) is reported at 24 F.3d 188.

JURISDICTION

The judgment of the Federal Circuit was entered on May 4, 1994. Rehearing was denied on July 14, 1994. (Pet. App. 117a-121a). On September 26, 1994, the Chief Justice extended petitioners' time to file a petition for a writ of *certiorari* until November 4, 1994. The petition was granted on April 3, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Several provisions of the Defense Production Act ("DPA"), 50 U.S.C. §§ 2061, *et seq.* (1988), are related to the disposition of petitioners' contract claims.

Section 101 of the DPA, 50 U.S.C. § 2071(a), provides:

> The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance of any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

Section 707 of the DPA, 50 U.S.C. § 2157, provides:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding

that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

STATEMENT OF THE CASE

A. The Compelled Production of Agent Orange

This case involves the most recent chapter in the long history of the government's use during the Vietnam War of the defoliant known as Agent Orange.[1] Petitioners are two chemical companies. During the 1960s, acting under the authority of the DPA, 50 U.S.C. §§ 2061, *et seq.*, the government ordered petitioners to produce and sell Agent Orange to the Department of Defense. (J.A. 8-10; Pet. App. 41a, 43a). Although Hercules and Thompson had some experience in producing herbicides for commercial use, neither company had ever produced defoliants and neither company understood the potential hazards that might accompany the military use of such defoliants. (C.A. App. 0544, 0546-0548, 0448, 0431, 0432).[2]

In contrast, the government had engaged in years of study concerning the use of defoliants for military applications and possessed a wealth of information pertaining to the hazards associated with the military use of such compounds. (C.A. App. 0430, 0502-0503). It is undis-

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[1] *See generally* Peter H. Schuck, *Agent Orange on Trial* (enlarged ed. 1987) ("Schuck").

[2] All citations to "C.A. App. ——" refer to the Joint Appendix filed in the proceedings before the United States Court of Appeals for the Federal Circuit.

puted that the government never disclosed that information to petitioners. Instead, the government developed and provided to Hercules and Thompson precise specifications for the production of Agent Orange. These specifications included the requirement that no warning labels or instructions of any kind be placed on the product. (*See* Contracts of Thompson Chemical Corp. and Hercules, Inc. lodged with the Clerk of the Court simultaneously with the filing of this brief, hereinafter referred to as "Contracts"; C.A. App. 0467, 0486-0487, 0576). The government periodically inspected Hercules' and Thompson's plants to verify that the composition of the Agent Orange precisely met these specifications.

The government knew as early as 1959 that the manufacture of Agent Orange according to these specifications could produce a dangerous by-product known as "dioxin." Hercules and Thompson, however, were ignorant of this possible result when they began manufacturing Agent Orange pursuant to the government's specifications. (J.A. 11, 25; *see* Contracts; C.A. App. 0446-0447, 0450, 0459, 0465, 0467, 0489).

The Agent Orange produced by Hercules and Thompson was provided to the government largely under "rated orders" pursuant to the DPA. *See In Re Agent Orange Prod. Liab. Litigation*, 597 F. Supp. 740, 844 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Under these rated orders, Hercules and Thompson were subject to civil and criminal penalties, as well as mandatory injunctions, if they failed to comply with the government's commands. The government's demand for Agent Orange eventually resulted in the virtual takeover of Hercules' and Thompson's production facilities, despite the protestations of both companies. (J.A. 24; C.A. App. 0619-0622, 0629, 0641-0422). Indeed, in March of 1967, the United States Department of Defense issued an order that required Hercules to divert its *entire* herbicide production capacity to the manufacture of Agent Orange. Hercules

requested relief from the government's rated orders in order to enable Hercules to satisfy its preexisting commercial commitments, but the government rejected that request.

For its part, Thompson went to extraordinary lengths to attempt to avoid altogether the compelled production of Agent Orange. Among other things, the President of Thompson personally flew to Washington, D.C., and petitioned the Department of Defense to release Thompson from the rated orders so that it would not have to manufacture Agent Orange. These efforts failed, and Thompson was ordered under the DPA to continue producing Agent Orange. (J.A. 24; Pet. App. 4a).

B. The *Agent Orange* Litigation

In the late 1970s, Hercules and Thompson, along with other Agent Orange manufacturers, were sued in a class action by thousands of U.S. veterans of the Vietnam War, and others, seeking damages for health problems allegedly resulting from exposure to Agent Orange (*"Agent Orange* litigation"). The plaintiffs alleged that Agent Orange produced in accordance with government specifications contained dioxin as a by-product, which they alleged was an extremely toxic substance that caused them to suffer health problems. The plaintiffs claimed up to $40 billion in damages. (J.A. 12-13, 25; Pet. App. 4a-5a, 50a; C.A. App. 0510).

The defendant manufacturers impleaded the government into the case as a third-party defendant. (Schuck at 60; J.A. 13). The trial court in the *Agent Orange* litigation granted summary judgment to the government with regard to the third-party complaint. *In Re Agent Orange Prod. Liab. Litigation*, 611 F. Supp. 1221, 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 204, 210 (2d Cir. 1987). The trial court, however, did not enter an order dismissing the government entirely from the action, but instead retained the government as a party for discovery purposes. (J.A. 13).

Hercules and Thompson moved for summary judgment in 1982 against the plaintiff class. They argued that the government had ordered them to produce Agent Orange in accordance with precise specifications and that, although the government knew of the product's alleged defects, Hercules and Thompson were unaware of any risk. Accordingly, Hercules and Thompson argued that they could not be held liable for any injuries that were caused by the government's use of Agent Orange. (Pet. App. 5a-6a, 50a). This defense, now known as the "government contractor defense," subsequently was recognized by a sharply divided Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

Judge Pratt, the first district judge assigned to the *Agent Orange* litigation, wrote a decision that granted petitioners' summary judgment motion. *In Re Agent Orange Prod. Liab. Litigation*, 565 F. Supp. 1263 (E.D.N.Y. 1983). Judge Weinstein, however, took over the *Agent Orange* litigation when Judge Pratt was appointed to the Second Circuit, and withdrew Judge Pratt's decision before it was entered as a formal judgment.[3] Thereafter, Judge Weinstein ruled that Hercules and Thompson should remain as defendants in the litigation and that the viability of the government contractor defense could not be determined on summary judgment, but would have to be determined by the jury during the trial on liability. *In Re Agent Orange Prod. Liab. Litigation*, 100 F.R.D. 718, 723 (E.D.N.Y.), *certification of appeal denied*, 100 F.R.D. 735 (E.D.N.Y. 1983).

Neither Judge Pratt's nor Judge Weinstein's initial analysis of the government contractor defense was informed by the views of the government. The government refused to support the assertion by Hercules and Thompson of the government contractor defense. Instead, the government watched from the sidelines in the class action

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[3] In the absence of the entry of a formal judgment, Judge Pratt's decision was a legal nullity. Fed. R. Civ. P. 58.

as the manufacturers struggled to deal with the myriad claims of United States veterans for injuries that allegedly were inflicted on them by the government. *See In Re Agent Orange Prod. Liab. Litigation*, 597 F. Supp. at 879. (Pet. App. 7a, 8a). Further, the government actively opposed and frustrated the contractors' efforts to obtain discovery from the government pertaining to the government contractor defense. (*See* Transcripts of discovery-related proceedings in the *Agent Orange* litigation lodged with the Clerk of the Court simultaneously with the filing of this brief).

Rather than risk a catastrophic judgment and continue to incur enormous attorneys' fees and litigation costs, Hercules and Thompson joined with the other defendant companies and settled the *Agent Orange* litigation. On May 7, 1984, on the eve of trial, Hercules, Thompson, and all of the other defendant companies settled with the Agent Orange class for a total of $180 million to be paid by the defendants on a market-share basis. (J.A. 13, 26; Pet. App. 50a, 7a).

Hercules' share of the settlement was $18,772,568. (J.A. 13; Pet. App. 51a, 7a). Thompson's share of the settlement was $3,096,597. (J.A. 26-27; Pet. App. 7a). Also, Hercules incurred defense costs in excess of $6 million during the litigation. (J.A. 13; Pet. App. 51a). Thompson incurred defense fees in excess of $3 million. (J.A. 27).

The government had refused to participate in the class action settlement negotiations. *In Re Agent Orange Prod. Liab. Litigation*, 597 F. Supp. at 879. On April 24, 1984, the government expressly advised the district court that "[t]he United States declines to attend or participate in settlement negotiations or court settlement conferences because any settlement of this case that calls for contribution by the United States is not warranted. This is the United States' firm position and we anticipate no change whatsoever in any aspect of it." *Id.*

Subsequently, the district court affirmed the Agent Orange settlement as reasonable and fair to the plaintiff class. The district court held that, if Hercules and Thompson had not settled, "there was a possibility of an ultimate liability with claims totalling *billions of dollars.*" *Id.* at 749 (emphasis added).

Some of the Agent Orange plaintiffs opted out of the class action settlement and continued to press their individual claims. (J.A. 14). Petitioners later moved for summary judgment against the opt-outs on various grounds, again including the government contractor defense. (Pet. App. 8a, 51a). Although the government had remained neutral during the earlier proceedings, now the government, a nominal party solely for discovery purposes, volunteered a vehement opposition to the assertion of the government contractor defense. (J.A. 34-71). The government argued in a brief in opposition to the petitioners' motion for summary judgment that "there exists substantial and convincing evidence that establishes not only that there are indeed genuine issues of material fact directly bearing on the validity of each and every contention relating to the government contract defense, but also that the defense does not further the policies it purports to serve." (J.A. 36).

Notwithstanding the government's position, Judge Weinstein granted summary judgment on the basis of the government contractor defense against all plaintiffs who had opted out of the class. *In Re Agent Orange Prod. Liab. Litigation,* 611 F. Supp. 1223, 1263-64 (E.D.N.Y. 1985), *aff'd,* 818 F.2d 187 (2d Cir. 1987), *cert. denied,* 487 U.S. 1234 (1988). In doing so, Judge Weinstein took a position exactly opposite to the position he had taken in the class action summary judgment motion filed by Hercules and Thompson.

The cost of the Agent Orange settlements and the legal fees had serious and adverse effects on the financial status of both Hercules and Thompson. In fact, Thompson ulti-

mately was forced to cease operations entirely. (J.A. 27-28). Moreover, both petitioners continue to defend numerous Agent Orange tort claims at considerable expense.[4]

C. The Government's Escape from Accountability

In 1990, Hercules and Thompson independently commenced actions in the United States Claims Court seeking damages from the government for the settlement and defense costs they had incurred in connection with the *Agent Orange* litigation. (J.A. 5-20, 21-32). Petitioners' principal claim was based on *United States v. Spearin*, 248 U.S. 132 (1918) and its progeny, including *Helene Curtis Industries v. United States*, 312 F.2d 774 (Ct. Cl. 1963). Hercules and Thompson each alleged that the government breached a contractual warranty of specifications by requiring them to manufacture Agent Orange, which the government knew to present significant hazards. (J.A. 14-15, 29-30; C.A. App. 0546-0549, 0633-0634, 0655-0661). Hercules and Thompson alleged that the government specifications were defective and that these specifications ultimately gave rise to the veteran plaintiffs' claims that they were harmed by Agent Orange. These claims subjected Hercules and Thompson to potentially enormous third-party liability. (C.A. App. 0502-0507, 0541-0542, 0549-0550).

Petitioners' other claims for relief arose from the government's breach of its obligation to disclose its superior

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[4] Hercules and other Agent Orange manufacturers continue to face claims by Vietnam veterans, by civilians, and by Korean Army veterans who served in Vietnam. *See, e.g., Ryan v. Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992); *Jae Sup Chung, et al. v. Dow Chem. Co., et al.*, No. C-94-2513 (N.D. Cal. 1994). They also have faced claims that the entire Agent Orange settlement agreement should be overturned and the original class action reinstated. *Ivy v. Diamond Shamrock Chems. Co. (In Re Agent Orange Prod. Liab. Litigation)*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994).

knowledge concerning the potential hazards of Agent Orange, the government's breach of its duty to exercise due care in using Agent Orange, and the government's breach of the duty of good faith and an obligation not to increase contract costs. (J.A. 15-19, 30-31).

Finally, both Hercules and Thompson claimed in their complaints that the government ordered them to produce Agent Orange under the provisions of the DPA and that, for this reason, they were entitled to relief. (J.A. 9-10, 23-24). In addition, Thompson made a specific claim for indemnification arising out of the DPA. (J.A. 30).

Prior to any discovery and solely on the basis of the pleadings, the Claims Court dismissed the complaints of Hercules and Thompson on summary judgment. The trial court held that all of the claims asserted by petitioners were barred as a matter of law. (Pet. App. 80a, 82a-115a).

A sharply divided panel of the Federal Circuit affirmed the dismissal of petitioners' *Spearin* claims on the sole ground that the government contractor defense would have provided Hercules and Thompson with an absolute defense to the claims of the plaintiff class in the *Agent Orange* litigation had that matter been litigated to a conclusion. (Pet. App. 23a, 40a). In particular, the Federal Circuit held:

> There can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed against Hercules or Thompson.

(Pet. App. 23a). The Federal Circuit concluded that the payments in settlement of the Agent Orange class action litigation made by Hercules and Thompson were purely "voluntary"—in effect gifts to Vietnam veterans and their families. (Pet. App. 23a). Thus, according to the majority, any breach by the government of a warranty of specifications did not "cause" petitioners' losses.

As to petitioners' claim that the government breached its obligation to disclose superior knowledge, the Federal Circuit propounded a rule that the doctrine of superior knowledge extends only to undisclosed information that increases costs during performance of a contract. Because the costs that petitioners incurred in defending and settling the *Agent Orange* litigation occurred after the actual performance of their contracts to manufacture Agent Orange, the Federal Circuit held that, as a matter of law, such costs could not be recovered. (Pet. App. 15a-16a).

Regarding the DPA claim, the Federal Circuit held that relief under the DPA was limited to costs associated with giving the priority of performance to the government rather than to private customers under contract. Accordingly, other costs that arise directly from compulsion to perform, such as those incurred in defending and settling the *Agent Orange* litigation, were not allowed. (Pet. App. 28a-33a).

Judge Plager vigorously dissented on each ground, concluding that "the law affords substantially more justice than the majority concedes." (Pet. App. 34a). Regarding the majority's claim that the government contractor defense certainly would have prevailed before the jury in the *Agent Orange* litigation, Judge Plager noted: "I do not know what the ultimate decision in the *Agent Orange* litigation would have been on this issue, nor does anyone." (Pet. App. 40a). After tracing the convoluted and complicated history of "the so-called 'government contractor defense,' " Judge Plager observed that the majority's suggestion "that the evolving government defense would clearly dictate the outcome in the original *Agent Orange* litigation seems to me to be unwarranted historical revisionism, out of place in the decision before us in this case." (Pet. App. 40a).

Judge Plager also rejected the majority's basis for dismissing the superior knowledge claim asserted by petitioners, commenting:

> There is neither prior authority nor present reason to limit the doctrine of superior knowledge to require compensation only for the difficulties incurred during performance. . . . [I]f the government's incomplete or misleading information, or its particular specification of its requirements, imposes losses, now or later, on the contractor, then the government, like any other contractor, should not escape responsibility.

(Pet. App. 41a, 43a). Further, Judge Plager viewed the majority's interpretation of the DPA as "a *non sequitur*," and one which "ignores the language of the statute." (Pet. App. 44a).

SUMMARY OF ARGUMENT

The government has engaged for years in unfair and harmful conduct towards Hercules and Thompson. Three decades ago, the government exercised control over the production facilities of Hercules and Thompson under the authority of the DPA and ordered them to manufacture Agent Orange. (J.A. 9, 23). The government provided Hercules and Thompson with exact specifications that the government, but not Hercules and Thompson, knew would result in a potentially dangerous product when used in the unprecedented manner intended by the government. (J.A. 9-10, 23-25). Years later, when Hercules and Thompson were sued by veterans alleging injuries from Agent Orange, the government refused to support their assertion of the government contractor defense and even opposed and frustrated their efforts to obtain discovery on the issue. (J.A. 34-71). Now, when Hercules and Thompson seek to recover in contract from the government for the significant, out-of-pocket financial losses they incurred in defending and settling the *Agent Orange* litigation, the government disclaims all liability on the grounds that petitioners simply volunteered millions of dollars to the Agent Orange class.

The government's approach reflects its assumption that it is completely immune from any accountability for ordering the production and use of Agent Orange. Under existing law, the government is not accountable in tort for its conduct. This Court has established that the government is immune from tort claims by members of the armed forces. *Feres v. United States*, 340 U.S. 135 (1950). This Court also has established that the government is immune from contribution claims by government contractors arising out of tort claims against contractors by members of the armed forces. *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977).

This Court, however, never has held the government immune from breach of contract actions in circumstances such as those presented here. Indeed, three separate legal theories establish, both independently and in unison, a right to recover in contract from the government: (a) breach of implied warranty, based on this Court's decision in *Spearin*; (b) breach of implied warranty, based on the government's superior knowledge of the hazards involved in the manufacture of Agent Orange, as articulated in *Helene Curtis*; and (c) an implied-in-fact indemnification obligation that derives from the compelled production of Agent Orange pursuant to the DPA and under circumstances that warrant finding such an indemnity obligation. Although the facts support all three of these grounds, any one of them, taken alone, is sufficient to entitle Hercules and Thompson to recover from the United States for the losses at issue.

The government is accountable to Hercules and Thompson for breach of implied warranty because the government dictated the specifications to Hercules and Thompson for the production of Agent Orange. (J.A. 14-15, 29). These specifications were defective because they resulted in a product that contained dioxin, the substance that the Agent Orange plaintiffs claimed caused their injuries. The government also is accountable to Hercules

and Thompson under the related superior knowledge doctrine because the government possessed knowledge about the dioxin hazard that petitioners did not have, but the government failed to provide this knowledge to petitioners. (J.A. 12, 30). Finally, the government is accountable to Hercules and Thompson because the government ordered Hercules and Thompson pursuant to the DPA to produce Agent Orange and because, when a contract is imposed on a contractor under the DPA in circumstances such as those present here, the contract contains an implied-in-fact indemnification provision.

The Federal Circuit held that the government was not liable on the *Spearin* claims solely because Hercules and Thompson settled the Agent Orange action. The Federal Circuit reasoned that "[t]here can be no serious doubt" that Hercules and Thompson would have avoided all liability had they proceeded to trial, and therefore that Hercules and Thompson had "volunteered" to suffer the losses represented by the settlement amount. (Pet. App. 23a). This holding cannot be sustained because absolute vindication by a jury never is a certainty, and could not have been predicted in the *Agent Orange* class action at the time petitioners entered into a settlement agreement. This holding also undermines the well-established policy of encouraging reasonable settlements of litigation.

The Federal Circuit rejected the superior knowledge argument on the additional ground that recovery is available only when the government withholds knowledge that bears upon the immediate costs incurred during the government contractor's performance under the contract at issue. (Pet. App. 16a). This limitation is contrary to the principles underlying the *Helene Curtis* doctrine, which are that the government cannot betray a contractor into a ruinous course of action by withholding knowledge pertinent to a contract. *See Helene Curtis*,

312 F.2d at 778. Although in *Helene Curtis* the government withheld knowledge pertinent to the actual performance of a contract, the principle underlying that decision logically extends to the government's withholding of knowledge pertinent to the safety of a product produced under a government contract.

Finally, the Federal Circuit rejected the argument that the orders exercised against petitioners under the DPA created an implied-in-fact agreement to indemnify petitioners against damages that might result. The Federal Circuit did recognize that the DPA established a *quid pro quo*, protecting government contractors to the extent that the power of the DPA is exercised. (Pet. App. at 29a-31a). The Federal Circuit concluded, however, that the DPA protected contractors only against damages resulting from the requirements of priority and that its protections did not reach third-party tort damages. (Pet. App. 32a-33a). This conclusion was erroneous because, as Judge Plager noted in dissent, it is not supported by the language of the DPA, is illogical, and is completely unjust to contractors that are required to perform government contracts because of the power of the government to inflict criminal and civil penalties against them. (Pet. App. 44a-45a).

ARGUMENT

It simply cannot be the law that the government can exert control over the operations of a government contractor, insist that the contractor manufacture a product according to precise specifications that carry a risk of harm to others, insist that a product be produced that the government—but not the contractor—knows could be potentially hazardous, do nothing to support the contractor who is sued by those who allegedly are harmed by the product due to defective specifications, and then avoid any accountability for the millions of dollars the private party loses. When the government exposes its contractors to such injuries, the government should be liable.

Here, petitioners seek an obviously right result by relying upon several related legal theories. The effort, however, to tease out the proper application of these various theories should not conceal the underlying and fundamental point: the government is the proper party to bear the costs that the compulsory production of Agent Orange imposed upon petitioners.

In searching for the proper legal theory upon which to allocate these costs to the government, petitioners first turn to the elements of the *Spearin* claims and show how the Federal Circuit's causation argument simply cannot be reconciled with established principles of contract law governing breach of warranty. Petitioners then argue that the closely related superior knowledge doctrine provides an alternative and reinforcing basis for recovery under the contracts at issue here. Petitioners finally show that the DPA clearly provides a basis for an implied-in-fact indemnification obligation when a government contractor suffers injury as a result of claims made by third parties stemming from the allegedly dangerous products the contractor is ordered to produce in accordance with government specifications.

At the end of the day, the point becomes unassailable that the Federal Circuit's decision to insulate the govern-

ment from all liability is profoundly unfair and unsupportable and, therefore, should be reversed.

I. THE GOVERNMENT'S BREACH OF AN IMPLIED WARRANTY OF SPECIFICATIONS ENTITLES HERCULES AND THOMPSON TO DAMAGES UNDER *UNITED STATES v. SPEARIN*

A. The Federal Circuit Erroneously Held That Hercules and Thompson Cannot Establish Legal Causation Between Their Damages and the Government's Breach of Implied Warranty

Almost 80 years ago, this Court recognized a contractual right of action against the government for breach of implied-in-fact warranties. The Court in *United States v. Spearin*, 248 U.S. 132 (1918), held that the government impliedly warrants that, if the contractor follows detailed specifications included as part of a government contract, the contractor "will not be responsible for the consequences of defects in the plans and specifications." *Spearin*, 248 U.S. at 136. Instead, the government is liable to its contractors if the specifications are defective, and must reimburse its contractors for the damages incurred by complying with the federal government's directions, including lost profits. *Spearin*, 248 U.S. at 136; *Poorvu v. United States*, 420 F.2d 993, 999-1000 (Ct. Cl. 1970); *Luria Bros. & Co. v. United States*, 369 F.2d 701, 707-08 (Ct. Cl. 1966); *Laburnum Constr. Corp. v. United States*, 325 F.2d 451, 457-58 (Ct. Cl. 1963).

In applying the *Spearin* doctrine, lower courts have held that the warranty implied when the government issues specifications include a warranty of safe design. As one court pointedly observed:

> It is not necessary to spell out that specifications having major safety defects are fully as much in breach of the implied warranty as defects in the feasibility, practicability, or commercial possibility of performance as specified.

Ordnance Research, Inc. v. United States, 609 F.2d 462, 479 (Ct. Cl. 1979); *see also Greenbrier Indus., Inc.*, ASBCA No. 22121, 81-1 BCA ¶ 14,982, *recons. denied*, 81-BCA ¶ 15057 (1991).

A breach of warranty claim generally involves the following elements: (1) a valid warranty existed; (2) the warranty was breached; and (3) plaintiff's damages were caused by the breach. (Pet. App. 17a). The Federal Circuit held here that Hercules and Thompson could not prove the third element: causation betwen their damages and the breach of implied warranty.[5]

The Federal Circuit held that causation was lacking on the sole premise that Hercules and Thompson voluntarily had entered into a settlement with the underlying plaintiffs. According to the Federal Circuit, had Hercules and Thompson pursued the *Agent Orange* litigation to judgment, the jury *would have* determined that the government contractor defense barred the imposition of tort liability against them. Thus, the Federal Circuit held that the settlement was a voluntary assumption of liability by Hercules and Thompson, for which the government could not be held responsible. (Pet. App. 23a).

The Federal Circuit was wrong because it is impossible to predict a jury verdict or the overall course of litigation under any circumstances. As Judge Plager stated in dissent: "I do not know what the ultimate decision in the *Agent Orange* litigation would have been on this issue, nor does anyone." (Pet. App. 40a). Notably, Hercules and Thompson had exhausted other methods of obtaining dismissal based on the government contractor defense, including making and losing motions for sum-

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[5] In the *Agent Orange* litigation, it has been judicially determined that the government mandated design specifications for Agent Orange and that Hercules and Thompson followed these specifications exactly, which gave rise to veteran plaintiffs' claims. (C.A. App. 46-48, 59-63).

mary judgment. *In Re Agent Orange Prod. Liab. Litigation*, 597 F. Supp. at 753.

The *Agent Orange* trial court expressly recognized, when it tentatively approved the ultimate settlement, that the chemical company defendants, including Hercules and Thompson, might have lost before a jury. The trial court noted that "there was a possibility of an ultimate finding of liability with claims totalling billions of dollars." *In Re Agent Orange Prod. Liab. Litigation*, 597 F. Supp. at 749.

Hercules and Thompson had reason to fear that the government contractor defense might fail before a jury, even though Hercules and Thompson believed that such a decision would have been wrong and ultimately would have been reversed on appeal. A jury might have been swayed, for example, by the plight alleged by the veterans to find erroneously that Hercules and Thompson did not satisfy one or more elements of the government contractor defense as then formulated by the trial court in the *Agent Orange* litigation. The government's efforts to obstruct petitioners' discovery on the key element of this defense (the government's knowledge of the hazards associated with Agent Orange), certainly increased the possibility of such an outcome.

Further, the underlying *Agent Orange* litigation was a class action involving many chemical companies in addition to Hercules and Thompson. (J.A. 25; C.A. App. 0510). Thus, a jury might have evaluated the knowledge of all of the chemical company defendants collectively, decided that at least some of them fully appreciated the dangers of Agent Orange, imputed this knowledge to all of the chemical company defendants, and accordingly rejected the government contractor defense for all of them. This approach would have been devastating to Hercules and Thompson because one or more chemical companies other than Hercules and Thompson may have possessed greater knowledge than Hercules and Thompson about the potential hazards of Agent Orange.

The Federal Circuit's decision also was unjustified because the status and parameters of the government contractor defense were uncertain when Hercules and Thompson settled the underlying action. This Court was years away from deciding *Boyle*. Some jurisdictions had not even accepted the existence of a government contractor defense. *See, e.g., Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036 (5th Cir. 1984); *reh'g denied* 744 F.2d 94; *cert. denied* 470 U.S. 1051 (1985); *In Re All Maine Asbestos Litigation*, 575 F. Supp. 1375, 1377 (D. Maine 1983), noting respectively that Texas and Maine law did not recognize a government contractor defense.

Among those jurisdictions that recognized the defense, there was no uniformity in its application. *See Tillet v. J.I. Case Co.*, 756 F.2d 591, 600 (7th Cir. 1985). By 1985, courts had formulated at least four different versions of the government contractor defense. A four-part test was established in *McKay v. Rockwell International Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied* 464 U.S. 1043 (1984); a three-part test was established in *In Re Agent Orange Product Liability Litigation*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982); a hybrid of the *McKay* and *Agent Orange* tests was established in *Koutsoubos v. Boeing Vertol, Division of Boeing Co.*, 755 F.2d 352 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985); and a two-part test was established in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985). The *McKay* formulation suggests that the defense applies only to claims by military personnel, while the *Agent Orange* formulation and *Boyle* would apply to civilian claims as well.

Hercules and Thompson did not know in 1984, when they settled the underlying action, whether this Court ever would recognize a government contractor defense

and, if it did, what elements this Court would recognize.[6] Thus, the decision to settle was a prudent solution to an inherently uncertain and perilous situation.

The Federal Circuit placed undue emphasis on the fact that the government contractor defense later prevailed against the opt-out plaintiffs in the *Agent Orange* litigation and that the Second Circuit affirmed that decision.[7] This fact does not prove that the government contractor defense would have prevailed before a jury in the class action but merely illustrates that litigation is inherently uncertain and that a litigant is wise to take advantage of reasonable settlement opportunities.

Ironically, in granting summary judgment based on the government contractor defense in the opt-out litigation, Judge Weinstein reversed the position he took on the government contractor defense in the class action. That position, in turn, reversed an earlier decision by Judge Pratt granting summary judgment on this defense. (Pet. App. 6a-7a). The district court's repeated changes of heart on this defense only underscore the uncertain status of the defense and the riskiness inherent in relying upon it, a point which bolsters the validity of the decision by Hercules and Thompson to settle. (Schuck at 182; C.A. App. 0513).

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[6] Notably, in 1940, this Court had recognized a defense for government contractors that was entirely different than the defense ultimately recognized in *Boyle*. In *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), this Court held that a contractor who properly performed work pursuant to a public works contract with the United States government was entitled to share in the government's immunity from suit and would not be liable for damages to third parties.

[7] The Federal Circuit also emphasized that Judge Pratt initially granted summary judgment on the government contractor defense to Hercules and Thompson. (Pet. App. 22a-23a). Since Judge Pratt's decision never was entered as a court order, but instead was withdrawn by Judge Weinstein, petitioners fail to understand why it was emphasized. *See supra* at 6.

In sum, it is far from certain that the government contractor defense would have prevailed at trial. Thus, the Federal Circuit plainly erred in ignoring the realities of litigation and in holding that the decision of Hercules and Thompson to settle was "voluntary." The causation requirement of a *Spearin* claim therefore has been satisfied and petitioners should be allowed to prove their damages.

B. The Federal Circuit's Approach Penalizes Hercules and Thompson for Their Unquestionably Reasonable Decision To Settle and Violates the Well-Established Principle That the Law Favors Settlements

The Federal Circuit held that Hercules and Thompson lost their right to assert a *Spearin* claim solely because they settled the *Agent Orange* litigation. By that reasoning, Hercules and Thompson would have been entitled to pursue a *Spearin* claim had they proceeded to trial and lost. In that event, presumably there would have been "causation" between the alleged damages (i.e., the verdict) and the implied warranty. Thus, the Federal Circuit's decision penalizes Hercules and Thompson solely because they decided to settle. (Pet. App. 18a-20a).

Penalizing litigants who reasonably settle underlying actions does violence to the well-established principle that the law favors settlement. *See Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989); *cert. denied*, 498 U.S. 865 (1990) ("[L]itigants, courts, and Congress view settlement as a positive force, indispensable to judicial administration"); *Ahern v. Central Pac. Freight Lines*, 846 F.2d 47, 48 (9th Cir. 1988) (quoting from *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977)) ("[t]here is an overriding public interest in settling and quieting litigation").

Basic contract principles call for the government to pay to Hercules and Thompson the damages that they incurred to third parties, whether these damages resulted

from a jury verdict or from a settlement with the third parties. Where a breach by one party to a contract results in claims by third persons against the other party to the contract, the party sued is not required to litigate the third-party claims to conclusion and lose in order to recover damages associated with the third-party claims. *Restatement (Second) of Contracts* § 351, cmt. c (1981). Rather, damages in a contract action often include both the cost of a settlement of an underlying third-party action and defense costs incurred in the underlying action. "In furtherance of the policy favoring private settlement of disputes, the injured party is also allowed to recover the reasonable amount of any settlement to avoid litigation, together with the costs of settlement." *Restatement (Second) of Contracts* § 351, cmt. c (1981).[8]

Similarly, Uniform Commercial Code ("U.C.C.") § 2-715(2) provides that consequential damages may include "(b) injury to person or property proximately resulting from any breach of warranty." As noted by the

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[8] Moreover, attorneys' fees incurred in third-party actions caused by a breach of contract are recoverable contract damages. *See United States v. San Francisco Elevator Co.*, 512 F.2d 23, 28 (9th Cir. 1975); Corbin, *Contracts*, § 1037. While this issue was not presented in *Vaughn v. Atkinson*, 291 F.2d 813, 815 (4th Cir. 1961), *rev'd on other grounds*, 369 U.S. 527 (1962), the court there noted, "The general rule is that in suits for breach of contract counsel fees may be allowed to the plaintiff if he can show that the defendant's breach of contract has caused litigation against third parties in which the plaintiff has been obliged to secure the services of counsel".

The Federal Circuit erroneously relied upon *Kania v. United States*, 650 F.2d 264 (Ct. Cl.), *cert. denied*, 454 U.S. 895 (1981), to hold that Hercules and Thompson may not recover attorneys' fees as damages for the breach of contract. *Kania* is inapposite because it does not involve defense costs in an action involving a third party, as does this case. Moreover, the decision in *Kania* rested upon jurisdictional issues, not upon the recoverability of attorneys' fees. *Id.* at 267-68. Accordingly, *Kania* does not detract from the general rule allowing recovery of attorneys' fees, in cases involving third-party litigation.

leading commentators on the U.C.C., "Consequential damages may also arise in the form of liability to third persons incurred as a result of the use or resale of the seller's product." White & Summers, *Uniform Commercial Code* § 10-4 at 519 (3d ed. 1988). Notably, this rule does not distinguish between liability incurred by judgments and by settlements.

These rules apply to claims against the government. Both the Court of Federal Claims and the Armed Services Board of Contract Appeals recognize the U.C.C. as the authority in government contract cases. *See Northern Helex Co. v. United States*, 455 F.2d 546, 553 (Ct. Cl. 1972); *Appeal of Garrity Co.*, ASBCA 12174, 67-2 BCA 6586 (1967); *United States v. Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966).

If the Federal Circuit's decision is permitted to stand, whenever a government contractor with a potential *Spearin* claim against the government is sued by a third-party plaintiff, the contractor will face a Hobson's choice. If the government contractor settles the third-party action, it will face the possibility that a federal court will decide in hindsight that it could have avoided any liability in the third-party action by litigating to conclusion the government contractor defense. If the government contractor does not settle, it will risk greater exposure and expense by proceeding to trial on the third-party claim with no guarantee that a *Spearin* claim seeking recovery of these expenses will succeed. The government also might contend that the government contractor failed to mitigate its damages.

The government argued in opposing *certiorari* that there is perfect symmetry between the government contractor defense and a claim under *Spearin*. According to this argument, if Hercules and Thompson could establish the elements of a *Spearin* claim in this action, then *a fortiori* they would have avoided all liability at trial in the *Agent Orange* litigation based on the government

contractor defense. (U.S. Opp. 17). Because Hercules and Thompson chose instead to settle, the government argued that they accepted liability voluntarily and are not entitled to assert a *Spearin* claim. *Id.*

In the first place, petitioners dispute the accuracy of the government's contention because the elements of the government contractor defense (at least in 1984) were different from the elements of a *Spearin* claim. Specifically, the success of the various versions of the government contractor defense in existence near the time that Hercules and Thompson settled required some element of proof that the contractor either failed to appreciate the defect in the product the contractor was asked to produce, or appreciated the defect but the government had equal or greater knowledge. *See* cases cited *supra* at 20. In contrast, an assessment of the contractor's knowledge is not a required element under *Spearin*. *See Spearin*, 248 U.S. at 132.[9]

More fundamentally, this argument fails because it completely overlooks the inherent uncertainty of the litigation process. Even when a government contractor has every reason to expect to be vindicated by the government contractor defense, it still is possible for the defense to fail. Litigation costs alone might be ruinous to some contractors. Thus, government contractors should seek out and take advantage of opportunities to enter into reasonable settlements.

The government's characterization of the settlement as voluntary should be rejected and the settlement and litigation costs in the *Agent Orange* litigation should be recognized for what they are: the direct by-product of

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[9] Further, as discussed *infra* at 28-31, the chance overlap between the elements of an affirmative defense to tort claims and the elements of a particular type of breach of contract claim does not require perfect symmetry of results in the tort and contract actions. Indeed, it unnecessarily would complicate the law of government contracts to import into it the complications inherent in tort litigation against the government.

the government's mandate that Hercules and Thompson produce an allegedly unsafe product. It is particularly disingenuous for the government to raise the government contractor defense as a certain defense after having vigorously opposed the applicability of this defense in the *Agent Orange* litigation.

C. Recognition of a *Spearin* Claim Will Not Provoke Excessive and Unnecessary Settlements

Recognition of a *Spearin* claim for damages incurred by government contractors in third-party tort litigation will not, as the government asserts (U.S. Opp. 18), provoke government contractors to enter into excessive and unnecessary settlements with the expectation of passing the costs along to the government. Government contractors are not likely to do so because they would have no guarantee that they ultimately would be able to recover a settlement from the government.

In the first place, they would need to meet the elements of a *Spearin* claim, including the requirement that the government promulgated *defective* specifications. Second, they typically would need to show that they had potential liability to the plaintiffs in the underlying actions. *See, e.g., Parfait v. Jahncke Servs., Inc.*, 484 F.2d 296, 304 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974), where the Fifth Circuit held, "[i]n settlement cases such as the instant one, the indemnitee has the special problem of showing that his disposition of the indemnitor's funds has not contravened equitable indemnity principles." The court there held that a showing of potential liability is sufficient when the alleged indemnitor had notice of the settlement and declined to participate in the settlement process. *See id.*[10] Third, they normally

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[10] In *Parfait*, Parfait settled a lawsuit brought against it by a third party, then sought reimbursement from Jahncke for the cost of the settlement. Parfait prevailed because it established that it was potentially liable to the third party, and also that Jahncke "had a clear opportunity to challenge the [underlying] liability to protect

would need to show that the settlement amount was reasonable under the circumstances.

These principles applied to this case compel the conclusion that the settlement here is recoverable in a *Spearin* action. *See Spearin*, 248 U.S. at 136. As discussed *supra* at 5-9, Hercules and Thompson unquestionably faced potential massive liability in the *Agent Orange* litigation. Also, a showing of potential liability was sufficient because, in the *Agent Orange* litigation, the government had notice of the settlement negotiations and declined to participate in them. *In Re Agent Orange Prod. Liab. Litigation*, 597 F. Supp. at 879. *See supra* at 7.

Finally, the settlement that Hercules and Thompson accepted was significantly lower than their exposure at trial. *See supra* at 8. The government never has challenged the settlement amount as unreasonable, and the trial court in the tort case expressly found that the settlement and its terms were reasonable. *In Re Agent Orange Prod. Liab. Litigation*, 597 F. Supp. at 857.[11]

There also is no merit to the government's concern about provoking unwarranted settlements by permitting recovery here, because the facts show that Hercules and Thompson made every effort to avoid liability short of submitting to a jury trial. They vigorously sought summary judgment on the basis of the government contractor

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its own interest as an indemnitor, yet it declined to do so." *Parfait*, 484 F. Supp. at 305.

[11] The trial court stated:

> Based on all the information presently available, the procedural posture of the litigation, the difficulty any plaintiff would have in establishing a case against any one or more of the defendants, the uncertainties associated with a trial, and the unacceptable burdens on plaintiffs' and defendants' legal staffs and the courts, the proposed settlement appears to be reasonable. It appears to be in the public's as well as the parties' interest.

In Re Agent Orange Prod. Liab. Litigation, 597 F. Supp. at 857.

defense and agreed to settle only after they lost that motion and were on the eve of a jury trial. (J.A. 26; Pet. App. 5a-7a). Thus, petitioners clearly made a full and fair effort to obtain dismissal, and did not blithely enter into a settlement comforted by the expectation that those costs would be borne ultimately by the government.

In short, the Federal Circuit determined erroneously that it should disregard the general law of contracts regarding the recoverability of costs incurred in settling third-party actions and instead re-examine *de novo* whether there existed a complete defense to those third-party claims. This Court's decision in *Spearin* was designed to protect an innocent contractor that suffers injury through third-party claims based on the government's specifications. Nothing in *Spearin* or its progeny provides any basis for bypassing the well-established law of indemnity for settlements that were made in good faith, with a reasonable basis and for reasonable amounts.

D. Recognition of a *Spearin* Claim Against the Government Will Establish Government Accountability for Ordering the Production of an Allegedly Hazardous Product

Recognition of a contract remedy against the government for losses incurred by government contractors as a result of third-party claims is necessary to compel government accountability for ordering the production and use of a potentially hazardous product when the government, and not the contractors, has knowledge of the risks. Liability in this case also will ensure symmetry among the government's existing immunities and protections.

Congress has adopted two Acts that allow suits against the government: the Tucker Act, 28 U.S.C. § 1346(a)(2) (1988), which permits the assertion of contract claims, and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 (1988), which permits the assertion of tort claims.

The jurisprudence surrounding the assertion of contract claims against the government is fairly simple. Cases arise under the Tucker Act between parties in privity; the government waives its immunity against private parties when it enters into contracts with such parties. The court in a contract matter simply enforces the agreement between the parties pursuant to established principles of contract law.

The government is answerable for its contract breaches even when the contract involves purchases and designs that are protected from tort claims by third parties:

> The policy considerations that motivate the sovereign to adopt the overall program do not create an umbrella that shields the Government from liability for breach of valid contracts customarily entered. A multitude of defense contractors would be surprised to be told that contracts for ship construction, aircraft production and munitions testing were unenforceable because they were related to defense and foreign policy goals.

Peter v. United States, 6 Cl. Ct. 768, 778 (1984). This Court in *Boyle* noted the contract basis of such actions, stating that the "liability may be styled one in tort, but it arises out of performance of the contract." 487 U.S. at 505. *See, e.g., Bird & Sons, Inc. v. United States*, 420 F.2d 1051 (1970). Indeed, the Federal Acquisition Regulations (FAR) applicable to cost reimbursement contracts do not distinguish between the recoverability of a tort-related cost and any other cost incurred in the course of performing the contract. *See* 48 C.F.R. §§ 28.311-2 and 52.228-7(c) (1994).

In contrast, a complex jurisprudence has developed around the government's waiver of sovereign immunity for tort claims. This waiver is complicated by a series of both statutory and judicial exceptions and by procedural and substantive limitations on tort recovery. For example,

the FTCA excepts: (a) tort claims that arise from the exercise of the government's discretionary functions or duties, 28 U.S.C. § 2680(a); and (b) claims arising in particular areas of governmental activity, such as combatant activities of the armed forces. *See* 28 U.S.C. § 2680(j). These limitations all are designed to restrict the government's tort exposure for injuries to individuals employed by the government who suffer from the government's discretionary activities.

The judiciary also has established certain limitations on the government's liability in tort actions. Specifically, this Court established in *Feres* that the government is not liable under the FTCA to a member of the armed forces who sustains an injury while in the course and scope of his duties. *See Feres,* 340 U.S. at 135. This exception was broadened in *Stencel* to preclude third-party claims against the government for contribution or indemnification in tort for damages paid by the third party to a member of the armed forces injured during military service. *See Stencel,* 431 U.S. at 666.

In *Stencel,* this Court reasoned that permitting a party to sue in tort under the Federal Tort Claims Act for indemnification against a tort claim brought against it by a member of the armed forces would circumvent *Feres* because *Feres* would bar a direct tort suit against the government by that member of the armed forces. *Stencel,* 431 U.S. at 673. That reasoning, however, does not preclude a contract action against the government by a government contractor. For example, permitting a contract action does not offend the principal underpinning of the *Feres* doctrine, which has been stated as the need to avoid litigation about military discipline, supervision and control. *See United States v. Shearer,* 473 U.S. 52, 58 (1985).

The *Feres* doctrine has been heavily criticized. *See United States v. Johnson,* 481 U.S. 681, 700 (1987)

(Scalia, J. dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received") (citations omitted). This Court has shifted away from the *Feres* doctrine, most recently by resting the government contractor defense in *Boyle* upon federal common law, rather than the *Feres* doctrine. *Boyle*, 487 U.S. at 504-07. Accordingly, this Court should hold that the *Feres* doctrine does not prevent government contractors from suing the government for breach of contract under *Spearin*. In this way the government is protected from tort liability, but remains accountable to contractors which have a direct contractual relationship with the government. Such contractors have no means other than contract of protecting themselves from potentially wide-ranging damage claims that ultimately may result from their compliance with government specifications.

II. THE GOVERNMENT IS ACCOUNTABLE TO HERCULES AND THOMPSON UNDER THE SUPERIOR KNOWLEDGE DOCTRINE FOR THE LOSSES THEY INCURRED FROM THE MANDATED PRODUCTION OF AGENT ORANGE

A related application of *Spearin* was first recognized in *Helene Curtis*.[12] The underlying principle is that "the

[12] Although petitioners did not treat the superior knowledge issue separately in the argument section of the petition for *certiorari*, they did advert to the issue several times in the petition itself. (Pet. 8-10 & nn. 7-9). Moreover, the superior knowledge issue is subsumed within the general question presented by Judge Plager's dissent, which was the essential question presented in the petition. The superior knowledge issue also is tied closely to *Spearin*, which unquestionably is before the Court, and thus the issue could be viewed as subsumed within that portion of the question presented as well. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 537 (1991); *Missouri v. Jenkins*, No. 93-1823, slip op. at 12-13 (U.S. June 12, 1995). Accordingly, petitioners have decided to present the "superior knowledge" contention as an alternative and reinforcing basis for reversal.

government—where the balance of knowledge is so clearly on its side—[cannot] betray a contractor into a ruinous course of action." *See Helene Curtis*, 312 F.2d at 778. This principle was applied in *Helene Curtis* in the context of the government's failure to disclose information pertinent to the actual performance of the contract. *Id.* The government, however, also violates this principle when the government fails to disclose superior knowledge pertinent to the performance or safety of a product after it has been produced in accordance with government specifications.

There has been a judicial finding that Hercules and Thompson had no knowledge of any toxicity problems associated with Agent Orange when they first were compelled to produce it. *See In Re Agent Orange Prod. Liab. Litigation*, 565 F. Supp. at 1272-73. Moreover, there is evidence that the government had, and withheld from Hercules and Thompson, superior knowledge regarding the hazards of Agent Orange. *See supra* at 3-4. Thus, the government is *prima facie* accountable to Hercules and Thompson under the superior knowledge doctrine.

The Federal Circuit erroneously rejected the superior knowledge application of *Spearin* on the primary ground that this doctrine is tenable only when the government withholds knowledge that bears upon costs incurred by government contractors during their performance of the contract at issue. (Pet. App. 16a). This limitation is contrary to the principles underlying that doctrine. *See Helene Curtis*, 312 F.2d at 778. Moreover, the Federal Circuit failed to cite any support for its decision.

The thoughtful approach taken by Judge Plager in his dissent captures the essence of petitioners' arguments. The contours of the superior knowledge doctrine can best be understood by recognizing that the superior knowledge and *Spearin* doctrines arise from a common thread. (Pet. App. 42a-43a). As even the Federal Circuit acknowl-

edges, the implied warranty of specifications recognized in *Spearin* is not limited to damages that manifest themselves during performance. (Pet. App. 42a). The majority offers no rationale for limiting the superior knowledge doctrine to such damages, when the remedy under *Spearin* is not so limited. (Pet. App. 15a-17a).

Accordingly, the Federal Circuit erred in failing to recognize that the government is accountable to Hercules and Thompson pursuant to the superior knowledge doctrine.

III. THE GOVERNMENT'S USE OF COMPULSION UNDER THE DPA RESULTS IN AN IMPLIED-IN-FACT CONTRACT TERM INDEMNIFYING PETITIONERS AGAINST DAMAGES ARISING FROM THE PRODUCTION OF AGENT ORANGE

The government virtually seized Hercules' and Thompson's production facilities under the authority of the DPA. Pursuant to this authority, petitioners were ordered under threat of criminal and civil sanctions to accept contracts they did not even wish to perform. Once they were engaged in the manufacturing process, they were required to devote all of their resources to the government's needs, required to adopt the government's specifications, and even were prohibited from displaying warning labels that could have protected users and reduced potential liabilities. *See supra* at 4. The government imposed these requirements on Hercules and Thompson even though the government knew that the resulting product possessed serious potential safety defects.

These circumstances, in which Hercules and Thompson were forced into a position of accepting liability for third-party claims, give rise to an implied-in-fact agreement to indemnify. Where the only voluntary actor is the government, the contract unilaterally imposed must be read to

include an implied contract term protecting contractors and indemnifying their losses.

A. The Plain Language of the DPA Requires Recognition of an Implied-in-Fact Contract Term Under These Circumstances

Under section 101 of the DPA, the government compelled petitioners to accept and perform the Agent Orange production contracts. That section of the DPA authorizes the President:

> (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance of any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 U.S.C. § 2071(a).

Given the sweeping authority granted the government, Congress crafted broad language to ensure that contractors did not face exposure for any civil liabilities that might arise from compliance with orders issued under the Act. Section 707 of the DPA provides, *inter alia*:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act.

50 U.S.C. § 2157.

This sweeping language expressly reveals Congressional intent to hold manufacturers harmless for any liabilities

which flow from compliance with an order issued under the Act. As described in the *amicus* brief of the U.S. Chamber of Commerce, since World War I, Congress has granted certain extraordinary powers to the President to facilitate military production. While earlier immunity provisions were limited expressly to contractual damages,[13] Section 707 of the DPA bars liability for any damages, whether "direct or indirect." When Congress amended Section 707 for clarity in 1952, the Senate Report accompanying the amendment used the broadest possible terms:

> The first sentence of Section 707 of the act contains the so-called exculpatory clause, which protects a person from liability, *under contract or otherwise*, as the result of compliance with the act or regulations issued under the act. This provision was included to encourage and assist people to comply with the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases.

S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* 1952 US. Code Cong. & Ad. News 1789, 1818-19 (emphasis added).[14]

The syllogism by which an implied contract term extends to these circumstances is straightforward: the scope of Section 707 is co-extensive with the requirements im-

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[13] *See generally amicus curiae* brief submitted on behalf of the U.S. Chamber of Commerce.

[14] The typical authority exercised under the DPA is to require acceptance for the purpose of ensuring that the contractor performs government contracts in priority over its commercial contracts. Liabilities arising from this typical case are potentially addressed by the doctrines of frustration or impossibility of performance. That many of these cases would be covered by these doctrines plainly does not confine the sweeping scope of protections from all damages, "in contract or otherwise," to only those particular contract damages arising from priority.

posed by Section 101 (a *quid pro quo*); Hercules and Thompson were required under the DPA to accept and perform contracts involving hazardous materials; therefore, an implied-in-fact indemnity covers those risks which Hercules and Thompson incurred by virtue of their performance of the contract.

The Federal Circuit recognized that the DPA's protections extend to the powers that are exercised thereunder (Pet. App. 28a), agreeing with Judge Weinstein that "[l]ogically, then, the protection afforded by section [2157] should correspond to the risk imposed." The Federal Circuit also recognized that petitioners were required under the authority of the DPA to accept contracts to produce Agent Orange. (Pet. App. 4a, 28a-29a). The Federal Circuit, however, avoided the logical conclusion that petitioners therefore should be indemnified by the government for their losses to third parties as a result of performing those contracts. Instead, the Federal Circuit held that no indemnity was created with respect to the damages flowing from the *Agent Orange* litigation because, in the view of the Federal Circuit, the protections of the DPA extend only to damages resulting from frustration of commercial contracts due to the priority given to the government's demands.

The Federal Circuit reached this decision because it read the DPA as if the "*quid pro quo*" established by the DPA was limited to the narrow range of damages arising from requirements that contracts with the government be given priority over contracts with other customers. (Pet. App. 30a). This approach does not correctly define the scope of authority under the DPA, or the relevant power conveyed by the Act: petitioners were required not merely to give priority to the government's contracts, but to *accept* and *perform* government contracts.[15]

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[15] The Federal Circuit also rebuffed petitioners' argument by saying that Congress knew how to make the scope of the provision

The Federal Circuit's effort to narrow the scope of the *quid pro quo* is contrary to the plain language of the statute, and is an act of legislative revisionism on the part of the majority.

B. Recognition of an Implied-in-Fact Contract Term Indemnifying Petitioners Is Required Under These Circumstances

Given the hazardous nature of the contracts imposed upon Hercules and Thompson pursuant to the DPA, the extent of control that the government exercised over Hercules and Thompson when they performed the contracts, and the protections granted to contractors by the express provisions of the DPA, an implied indemnification obligation should be recognized in this case.

This Court long has recognized that contracts can contain implied indemnification provisions. In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 133-34 (1956), for example, this Court imposed an obligation on a stevedore company to indemnify a shipping company from harm resulting from the unsafe handling of cargo by an employee of the stevedore company. This Court viewed the stevedore-indemnitor's duty

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broad and inclusive, if it had so intended (Pet. App. 30a). This assessment is mystifying; the language could not be more plain or expansive. Congress went so far as to declare that even "indirect damages" were not to result from compliance with orders under this Act. 50 U.S.C. § 2157.

The Federal Circuit also relied upon the second sentence of the section, "which prohibits discrimination 'against contracts to which priority is assigned . . . ,' " (Pet. App. 32a), to bolster its conclusion that this was the exclusive concern of Congress. But this strained interpretation is to no avail; no rule of statutory construction allows the definitive and sweeping protections of the first sentence to be limited only to those distinct situations dealt with in the remainder of the paragraph. The Federal Circuit's analysis simply divests the plain language of its meaning and fails to carry out that which Congress clearly intended.

to handle operations safely as an "obligation [which] is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioners' stevedoring contract." [16]

Other cases have recognized the concept that, where one party has caused another to become exposed to liability from third parties, a contractual indemnity may be implied-in-fact in an appropriate case. *See, e.g., Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1219 (9th Cir. 1974).

Courts also have imposed an implied contractual indemnity upon the government where the government's role in exposing a contractor to liability to third parties normally would give rise to a *Spearin* claim. For example, in *Michigan Wisconsin Pipeline v. Williams-McWilliams*, 551 F.2d 945 (5th Cir. 1977), Williams-McWilliams Company entered into a contract with the government to dredge a ship channel. In performing the contract, Williams-McWilliams relied upon government specifications, which failed to reveal the presence of an underwater pipeline. Williams-McWilliams damaged the pipeline while performing the contract, and was held liable to Michigan Wisconsin Pipeline Company, which owned the pipeline. Williams-McWilliams asserted a

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[16] While the plaintiff in *Space Age Engineering, Inc. v. United States*, 4 Cl. Ct. 739, 742 (1984), had not pleaded sufficient facts for a finding of an indemnity, the court there noted that reliance upon a statutory provision is a well-established basis for implied-in-fact contract actions against the United States:

> This court cannot redress the violation of a statute or regulation which create no enforceable rights, *citations omitted*, but a plaintiff may rely on the violation of a statute or regultion to show its implied contract for fair consideration has been breached. *Dynalectron Corp. v. United States*, 4 Cl. Ct. at 428; *see also Alabama Metal Products, Inc. v. United States*, 3 Cl. Ct. 530 at 534 (1984); *Electro-Methods, Inc. v. United States*, 3 Cl. Ct. 500, 508 (1983), *aff'd in part*, 728 F.2d 1471 at 1475 (Fed. Cir. 1984).

third-party action against the government, alleging that the government was at fault because it provided defective specifications. The district court dismissed the third-party action but the Fifth Circuit reversed, holding that:

> We agree that when a contractor has justifiably relied upon government representations he should be protected from claims by third parties . . . .

Id. at 951.

Similarly, in *Travelers Insurance Co. v. United States*, 493 F.2d 881 (3d Cir. 1974), a federal employee was fatally injured while working on a tower. The tower had been built by a manufacturer in accordance with government specifications. The employee's estate sued the tower's manufacturer, which was held liable to the estate. The manufacturer sued the government for indemnification and contribution. The district court dismissed the action on the grounds that the government could not be liable in indemnification or contribution. On appeal, the Third Circuit reversed and remanded to determine whether the manufacturer could recover under a theory of implied contractual indemnity. 493 F.2d at 887-88.[17]

In this case, the unilateral decision of the government to involve petitioners in contracts under a statute that expressly allocates risk away from the contractor reinforces a finding of an implied-in-fact indemnity. Implied-in-fact contract terms providing for warranty or for indemnity arise when the circumstances show that a party creating risk contracted to be legally responsible for the risk. Circumstances to be considered include statutory provisions. Here, the entire context of the DPA suggests

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[17] Similarly, in the asbestos cases, one court indicated that it might be possible to interpret the extreme control the government took over the specifications and manufacturing as an implied contractual indemnification. *Johns-Manville Sales Corp. v. United States*, 622 F. Supp. 443, 449-50 (N.D. Cal. 1985).

that the government contracted to be legally responsible for the risks of Agent Orange. *See supra* at 34-37.

As this Court recognized in *Ryan*, the proper legal remedy in cases such as these involves placing the financial burden upon the party that caused the damage. Here, the government clearly caused the damage; in fact, it is the only party that acted in a completely voluntary manner. The government ordered Hercules and Thompson to produce Agent Orange, and it dictated the specifications of the product with knowledge of its dangers. Thus, the government is obligated to indemnify Hercules and Thompson for the losses that they suffered as a result.

This matter comes before the Court in a posture strained by the failure of the DPA to protect petitioners in the underlying tort litigation, despite its clear language. Ultimate causation, however, lies with the government. Where the government, with knowledge of risk, orders manufacture of a product for which it specifies the design and regarding which it has superior knowledge, the obligation to indemnify from harm must lie in the essence of that contract. A finding of an implied-in-fact indemnity would effectuate the intent of Congress, redress the unmistakable inequities to petitioners, and give force and effect to the contractual responsibilities the government assumed under the DPA toward Hercules and Thompson.

C. The Anti-Deficiency Act Does Not Constitute a Bar to the Government's Indemnification of Plaintiff

In opposition to *certiorari*, the government argued that the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988), supposedly bars the implied-in-fact indemnity relied upon by Hercules and Thompson by characterizing petitioners' claim as seeking to enforce an unauthorized contractual provision. The Anti-Deficiency Act provides in relevant part:

> (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—
>
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

An implied-in-fact indemnity, however, falls outside the scope of this statute. Such an indemnity is judicially fashioned and is not an express contractual provision. An implied-in-fact indemnity arises from the powers of the court, not from the powers of a government officer or agent. The recognition and enforcement of an implied-in-fact indemnity therefore does not violate the Anti-Deficiency Act.[18]

The Anti-Deficiency Act also is inapplicable here because the contracts at issue arise from the compulsory powers of the DPA and also from the DPA's provisions that protect contractors from third-party claims resulting from the exercise of those compulsory powers. What Congress has created by statute is enforceable without regard to the Anti-Deficiency Act.

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[18] Additionally, several exceptions to the Anti-Deficiency Act would allow recovery here even if that Act were held to apply. For example, there are statutory exemptions for hazardous activities—an exception certainly applicable here, given that Agent Orange was a hazardous material. *See Matter of Assumption by Government of Contractor Liability to Third Persons—Reconsideration*, 62 Comp. Gen. 361 at 365 (1983). At a minimum, the Court should not undertake to affirm on this alternate ground.

CONCLUSION

For the above reasons, petitioners respectfully request that this Court reverse the decisions of the Federal Circuit and remand this action for further proceedings.

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HERCULES, INCORPORATED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether military supply contracts between petitioners and the United States included an implied-in-fact obligation under which petitioners are entitled to reimbursement by the United States for costs incurred in litigating and settling product liability claims brought by third parties.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-818

HERCULES, INCORPORATED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 24 F.3d 188. The opinions of the United States Claims Court (now the Court of Federal Claims) (Pet. App. 47a-80a, 82a-115a) are reported at 25 Cl. Ct. 616 and 26 Cl. Ct. 17.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1994. Petitions for rehearing were denied on July 7, 1994. Pet. App. 117a-120a. On September 26, 1994, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 4, 1994, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(a) of the Defense Production Act of 1950, 50 U.S.C. App. 2071(a) (1988 & Supp. V 1993), provides in pertinent part:

> The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance.

Section 707 of the Defense Production Act of 1950, 50 U.S.C. App. 2157, provides:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act * * *, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act [50 U.S.C. App. 2071-2076] or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

The Anti-Deficiency Act, 31 U.S.C. 1341 (1988 & Supp. V 1993), provides in pertinent part:

> (a)(1) An officer or employee of the United States Government * * * may not—

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

STATEMENT

1. Between 1964 and 1968 the United States purchased substantial quantities of the defoliant Agent Orange from several herbicide manufacturers, including petitioners. Pet. App. 3a; C.A. App. 464-482, 573-618. The defoliant was produced in accordance with government specifications and was used, as the manufacturers were aware that it would be, in fighting the Vietnam War. See Pet. App. 49a-50a, 84a-85a. The procurement contracts contained no warranty or indemnification provisions. *Id.* at 19a n.8.

Depending on how it is produced, Agent Orange may contain a by-product known as dioxin.[1] Pet. App. 3a. Beginning in 1979, a number of Vietnam veterans and their families sued the manufacturers of Agent Orange, including petitioners, seeking compensation for injuries allegedly caused by exposure to the defoliant, and in particular to dioxin, during the war. The manufacturers, in turn, filed a variety of third-party claims against the government. See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 769 (E.D.N.Y.

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[1] The courts below made no findings about the emergence, over time, of concerns about the possible hazards of dioxin. There is no question, however, that the larger manufacturers of Agent Orange developed considerable knowledge in that regard. Indeed, petitioner Hercules altered its production methods to eliminate dioxin following a meeting called by Dow Chemical Company in 1965. The government was not informed of that meeting. Pet. App. 4a, 49a-50a & n.5.

1980). Despite the ensuing litigation and years of investigation and controversy, it has never been established that exposure to dioxin in Agent Orange caused the various injuries alleged by the plaintiffs in those actions. See, *e.g.*, Pet. App. 7a-8a, 48a n.2, 64a-65a, 83a n.2, 97a-98a; *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 782-795 (E.D.N.Y. 1984) (opinion approving settlement).

The Agent Orange cases were consolidated in the Eastern District of New York. In 1980 Judge Pratt dismissed all third-party claims against the United States, ruling that contract claims were not properly before the court, and that tort claims were barred by principles of governmental immunity. *In re "Agent Orange"*, 506 F. Supp. at 769-782. The same decision suggested that the private defendants might be protected by the "government contract[or] defense," but declined to enter summary judgment on that ground pending discovery on the relevant factual issues. *Id.* at 792-797. The government contractor defense generally shields contractors from tort liability for injuries caused by products manufactured for the government so long as the contractor followed detailed government specifications, knew no more than the government about any hazards involved, and did not withhold from the government any information relevant to those hazards. See, *e.g.*, Pet. App. 5a-6a, 21a-22a.

In 1983 Judge Pratt (now sitting by designation, after his appointment to the court of appeals in 1982) granted motions for summary judgment in favor of petitioners and two other manufacturers, based in large part on the government contractor defense. Pet. App. 4a-6a; *In re "Agent Orange" Product Liability Litigation*, 565 F. Supp. 1263, 1275 (E.D.N.Y. 1983). He deferred entry of final judgments, however, pending final action on class certification. See 565 F. Supp. at 1277; see also Fed. R. Civ. P. 54(b). Shortly thereafter Judge Pratt withdrew from presiding over the proceedings, and the case was reassigned to Chief Judge Weinstein.

Chief Judge Weinstein reconsidered and denied petitioners' motions for summary judgment, and set the case for trial. See Pet. App. 7a, 36a n.2. Shortly thereafter, at the manufacturers' request, he also reconsidered Judge Pratt's 1980 order dismissing the manufacturers' third-party claims against the government. He reinstated those claims in part, and suggested that he might submit all of them to an advisory jury. *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1256 (E.D.N.Y. 1984).

On the eve of trial, the private parties entered into a settlement calling for a total payment of $180 million, to which each defendant contributed based on its share of the total volume of Agent Orange produced, adjusted for the level of dioxin in its product. Pet. App. 7a. The United States was not a party to the settlement, took no part in the settlement discussions, and expressed no view on the applicability of the government contractor defense in the settled cases. See *id.* at 114a-115a; *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 160 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). Petitioner Hercules' share of the settlement payment was approximately $18.8 million; petitioner Thompson's share was approximately $3.1 million. Pet. App. 7a.

The district court issued an extensive opinion approving and justifying the settlement. *In re "Agent Orange"*, 597 F. Supp. at 740-898. The court emphasized the inadequacy of proof that Agent Orange actually harmed any of the plaintiffs (*id.* at 775-795, 782, 816-817), and discussed the availability of the government contractor defense as a potential bar to the manufacturers' liability (*id.* at 845-850).[2] In affirming the settlement, which it characterized as "essentially a payment of nuisance value" by the defendants, the Second Circuit observed that the

[2] The court rejected the manufacturers' argument that recovery was barred by Section 707 of the Defense Production Act, 50 U.S.C. App. 2157. *In re "Agent Orange"*, 597 F. Supp. at 843-845.

district court "clear[ly] * * * viewed the plaintiffs' case as so weak as to be virtually baseless." [3] *In re "Agent Orange"*, 818 F.2d at 151, 171, aff'g 597 F. Supp. 740 (E.D.N.Y. 1984).

Nearly 300 plaintiffs opted out of the Agent Orange settlement. Pet. App. 7a. Chief Judge Weinstein subsequently granted summary judgment against these non-settling plaintiffs, "primarily on the ground that the plaintiffs had failed to present credible evidence of a causal link between exposure to Agent Orange and the plaintiffs' alleged injuries," and alternatively because "the defendant companies were insulated from liability by the government contractor defense." [4] *Id.* at 8a, citing *In re*

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[3] In characterizing the settlement, the court of appeals noted that while the absolute amount involved "seems extraordinary," the suit involved some 240,000 potential claimants alleging a variety of relatively serious injuries. 818 F.2d at 151; see also *id.* at 181-182. The settlement provided for cash payments to only a minority of claimants; the estimated maximum individual payments were approximately $12,000 (over ten years) for totally disabled claimants and $3,000 for survivors of deceased claimants. See *id.* at 151; *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1396, 1418, 1421 (E.D.N.Y. 1985). The Agent Orange Veterans' Payment Program created by the settlement has advised us informally that it received approximately 100,000 claims for payment under the settlement, of which approximately 45,000 have been granted and approximately 35,000 remain pending.

[4] During the opt-out litigation, the United States argued that the applicability of the government contractor defense in those cases should not be resolved on a pending motion for summary judgment. See J.A. 34-71; see also Pet. App. 104a, 113a-115a. The government did not question the availability of the defense in appropriate circumstances. Rather, the government argued (i) that the manufacturers, which had convinced the district court to reinstate their claims against the government, could not at the same time invoke the government contractor defense, which rests on the same principles of immunity invoked by the government in opposition to the manufacturers' claims (J.A. 36-39); (ii) that the contractor defense should not apply to claims of negligent manufacture of defective goods under government contracts (J.A. 52-57);

"Agent Orange" Product Liability Litigation, 611 F. Supp. 1223, 1259-1260, 1263 (E.D.N.Y. 1985). In related rulings, the district court and the Second Circuit also finally rejected all third-party tort claims by the defendant manufacturers, including petitioners, against the government. See *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1221, 1222-1223 (E.D.N.Y. 1985), aff'd in part, rev'd in part, 818 F.2d 204 (1987).

2. In 1990, each petitioner filed a breach-of-contract action against the United States in the Claims Court (now the Court of Federal Claims), seeking reimbursement for the costs of litigating and settling the Agent Orange litigation. See Pet. App. 9a; J.A. 5-32. Both petitioners alleged that the government had made and breached an implied warranty of specifications with respect to Agent Orange. J.A. 14-15, 29; see Pet. App. 9a-10a. Petitioner Thompson also contended that the government had an implied obligation to indemnify Thompson because Thompson's manufacture of Agent Orange was compelled by the government under the Defense Production Act of 1950 (DPA), 50 U.S.C. App. 2061 *et seq.* J.A. 29-30; Pet. App. 10a.[5]

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and (iii) that there were remaining factual issues, requiring at least further discovery, with respect to each element of the defense. Those factual issues included whether the government "established the specifications" for Agent Orange with respect to the presence of dioxin (J.A. 39-41, 57-64); whether the Agent Orange produced by the various manufacturers met the government's specifications (J.A. 64); and whether particular manufacturers were aware of possible product hazards of which they failed to inform the government (J.A. 65-71).

[5] Both petitioners also alleged breach of an implied obligation to divulge superior knowledge of intended uses and risks. In addition, petitioner Hercules alleged breach of implied obligations to act in good faith and to exercise due care in the use of Agent Orange. Pet. App. 9a-10a. The courts below rejected those contentions. *Id.* at 15a-16a, 25a-27a, 56a-60a, 91a-92a. Petitioners did not renew those claims in their petition for certiorari. See Pet. i, 10-19; U.S. Br. in Opp. 5 n.3, 10 n.7; see also note 11, *infra*.

The Claims Court granted summary judgment in favor of the United States.[6] The court concluded (Pet. App. 64a-68a, 96a-99a) that, even if a warranty of specifications were implied, petitioners could not prove the existence of damages caused by a defect in the government's specifications because prior proceedings had established that the tort plaintiffs could not show that they had been harmed by Agent Orange. The court also held (*id.* at 67a-68a, 99a-100a) that there could have been no breach of any warranty of specifications "because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense." *Id.* at 68a, 100a. Moreover, to the extent that petitioners' claims depended on implied indemnities in their government contracts, they were barred by the Anti-Deficiency Act, 31 U.S.C. 1341 (1988 & Supp. V 1993), which provides that officers and employees of the United States may not normally authorize expenditures in excess of funds previously appropriated by Congress. Pet. App. 78a-79a, 102a-103a.

The Claims Court also rejected (Pet. App. 100a-102a) petitioner Thompson's argument that a contractual indemnity should be implied on the basis of the Defense Production Act.[7] Section 707 of that Act, 50 U.S.C. App. 2157, provides in part that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to [the DPA]." The court held that Section 707 provides a de-

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[6] While petitioners correctly note (Br. 10) that no discovery was taken in the Claims Court actions, they fail to add that the parties presented to the court undisputed documents and testimony from the extensive discovery conducted in the Agent Orange tort litigation. See, *e.g.*, C.A. App. 263-421.

[7] Petitioner Hercules did not rely on the DPA before either the Claims Court or the Federal Circuit. See Pet. App. 14a, 28a; J.A. 14-19 (complaint).

fense to actions claiming breach of non-government contracts adversely affected by the priority accorded to government orders under the DPA, not an indemnity for tort damages paid to third parties injured by products manufactured under government contracts. Pet. App. 101a.

Finally, the court determined that petitioners' claims were fundamentally inconsistent with the government contractor defense. Pet. App. 68a-78a, 104a-115a. The court agreed with the government (*id.* at 75a-76a, 110a-111a) that the purpose of the defense—to insulate government procurement decisions from considerations of potential future tort liability—would be subverted by allowing a contractor to require government reimbursement of tort damages that the contractor could have avoided by invoking the defense. The court also agreed (*id.* at 76a-77a, 111a-113a) that petitioners could have invoked the government contractor defense to avoid all liability in the Agent Orange class action, just as they invoked it to avoid liability to the plaintiffs who opted out of the class-action settlement.

3. The court of appeals consolidated petitioners' cases and affirmed. Pet. App. 1a-33a. The court agreed (*id.* at 18a-19a & n.8) that scientific proof of dioxin-related injuries was "sparse," and that, in any event, "the facts would have to be stretched" to conclude that the government had made and breached any implied warranty that would permit petitioners to recover their litigation and settlement costs. The court chose to rest its decision, however, on the ground that petitioners "cannot prove that their damages were caused by the government's alleged breach * * * because [petitioners] were protected from liability to the Agent Orange plaintiffs by the government contractor defense." *Id.* at 19a-20a. Observing that petitioners "successfully argued on three separate occasions that the government contractor defense shielded them from liability for the veterans' tort claims," the court concluded that "there can be no serious doubt

that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed" against them. *Id.* at 23a. Petitioners made a voluntary decision to settle rather than to press their defense in litigation; their contributions to the settlement fund resulted from that decision, not from any breach of a contractual duty by the government. *Ibid.*

The court of appeals also rejected (Pet. App. 28a-33a) petitioner Thompson's argument that Section 707 of the Defense Production Act created an implied contractual commitment by the government to indemnify DPA contractors for losses arising from tort suits brought by third parties. Like the Claims Court (and the district court that approved the class action settlement), the court concluded (Pet. App. 33a) that Section 707's protection "extends no further than the risk imposed by" Section 101(a) of the DPA, which authorizes the President to require that performance under defense contracts "take priority over performance under any other contract or order." 50 U.S.C. App. 2071(a) (1988 & Supp. V 1993). The court thus interpreted Section 707 to provide only "a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements." Pet. App. 29a. "Accordingly, invocation of the DPA by the government * * * did not give rise to an implied-in-fact contractual obligation * * * to indemnify Thompson for its contribution to the Agent Orange settlement fund." *Id.* at 33a.

Judge Plager dissented. Pet. App. 34a-46a. In his view, the uncertain scope of the government contractor defense at the time of the Agent Orange settlement undermined the majority's conclusion that petitioners suffered no damages because they would have faced no liability if they had refused to settle. *Id.* at 35a-40a. Judge Plager would also have read Section 707 of the DPA as a general "hold harmless" provision, under which the govern-

ment was required to indemnify petitioner Thompson for any damages, including tort liability to third parties, arising out of Thompson's production of Agent Orange. Pet. App. 43a-45a. Believing that there were "a number of unresolved fact and law issues," Judge Plager would have remanded the case with instructions to hold a full trial. *Id.* at 40a.

SUMMARY OF ARGUMENT

This is an action for breach of warranty. As the Claims Court properly recognized, however, there was never any warranty that would have allowed for recovery in the circumstances of this case; and if there had been, petitioners could not have proved that it was breached. The courts below therefore properly entered judgment for the government.

1. Petitioners concede that their contracts with the government contained no express warranty or indemnity provisions. They therefore rely on a "warranty of safe design" that they assert was "implied in fact" in the contractual relationship. That claim is patterned on the principle that, when the government provides detailed specifications to be followed by a contractor, it is presumed to warrant that those specifications do not contain latent errors or defects that will make performance impossible or more difficult than the contractor would reasonably have anticipated. No court, however, has ever extended that theory beyond the realm of increased difficulties or expenses in contract performance to find that the government warrants that its specifications will produce a product free of any alleged "defect" that might be the basis for a tort claim by a third party. Nor is there any reason for this Court to adopt such an extension. The implied warranty that petitioners propose would not be a reasonable construction of the parties' intentions, and it would severely undercut the govern-

ment's unquestioned immunity from tort liability for its design decisions or other discretionary functions.

Petitioners contend that, if the Court does not adopt the rule they advocate, contractors may be "compelled" to manufacture goods to government specifications, and then unfairly be left to bear what should be the government's liability if those specifications turn out to be "defective." Any such concern is adequately addressed by the government contractor defense, which protects contractors from unwarranted tort liability. There is no reason to supplement that tort-law doctrine with a new implied contractual warranty. Such a warranty would be redundant, and it would undermine the operation and goals of the government contractor defense.

Finally, even if this Court were to recognize an "implied warranty" of the sort petitioners seek, it would not avail petitioners in this case. As the Claims Court correctly held, petitioners cannot show that there was any defect in the specifications provided by the government for the manufacture of Agent Orange. Those specifications called for petitioners to combine, in particular proportions and concentrations, herbicidal compounds that petitioners already manufactured for the commercial market. Nothing in the government's orders controlled the way petitioners produced those compounds, or required that they contain dioxin. (Indeed, petitioner Hercules eventually took unilateral steps that succeeded in eliminating dioxin from its Agent Orange.) Moreover, after 16 years of litigation, every court that has considered the matter has agreed with petitioners that there is no proof that dioxin in Agent Orange caused any of the injuries claimed by the plaintiffs in the tort litigation that petitioners chose to settle. The lack of any proof of defect or causation would be fatal to petitioners' contentions here, even if a warranty were to be implied.

2. Petitioner Thompson also contends that this Court should imply a warranty or indemnity extrapolated from Section 707 of the Defense Production Act of 1950

(DPA), 50 U.S.C. App. 2157. Section 101 of the DPA permits the United States to require that manufacturers sell their products to the government for military use, even if those sales prevent the manufacturer from honoring orders from or contracts with its commercial customers. Section 707 protects suppliers from liability for "damages or penalties for any act or failure to act resulting directly or indirectly from compliance with" such requirements.

Every court that has interpreted Section 707 has agreed with the courts below that its protection extends only to precluding liability for breaches of contractual or other duties to nongovernment customers whose orders are displaced or delayed by compliance with a DPA order. Moreover, whatever the scope of Section 707 as a defense to actions against a government supplier, nothing in the DPA suggests that it was intended to create a right of indemnity against the government for any liability the supplier might incur despite the existence of that defense.

ARGUMENT

I. THE GOVERNMENT NEVER MADE OR BREACHED A PROMISE THAT ITS ORDERS FOR AGENT ORANGE WOULD NOT GIVE RISE TO PRODUCT LIABILITY LAWSUITS BROUGHT BY THIRD PARTIES

A. No Court Has Recognized An Implied Warranty That Government Contract Specifications Are Free From "Defects" Unrelated To The Cost Or Difficulty Of Performance Under The Contract

This is an action for breach of contract. Petitioners have never maintained, however, that their contracts with the government for the supply of Agent Orange included any express warranty or indemnity provisions. See, *e.g.*,

Pet. Br. 16-17; Pet. App. 19a n.8.[8] They argue instead (Br. 17-31) that their supply contracts included an implied "warranty of safe design" (Br. 17) that the government breached by specifying the basic chemical composition of Agent Orange (see Br. 13). Petitioners allege, as they must, that that warranty is one implied "in fact."[9] They therefore bear the burden of showing that such a warranty represents a reasonable reflection of the parties' original intentions—*i.e.*, that recognizing it would "simply enforce[] the agreement between the parties" (Pet. Br. 29). Compare *Baltimore & O.R.R.* v. *United States*, 261 U.S. 592, 597-598 (1923).

Petitioners base their argument on a line of cases beginning with this Court's decision in *United States* v. *Spearin*, 248 U.S. 132 (1918). *Spearin* involved a contractor who agreed to build a dry-dock according to detailed plans provided by the Navy. The plans called for the contractor to relocate a sewer in a specific manner, which he did. An error in the Navy's plan of the existing sewer caused the relocation to be unsatisfactory, leading

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[8] Several of the contracts themselves are reproduced at pages 464-481 and 573-618 of the joint appendix filed in the court of appeals. Because the reproductions are often difficult to read, the best available copies of one contract with each petitioner have been separately lodged with the Court. Although bound under joint cover with the contracts, the extensive transcripts of discovery proceedings in the Agent Orange tort litigation (which were not presented to the courts below in this case) were lodged by petitioners alone.

[9] The Claims Court's jurisdiction to enforce contracts against the government extends only to obligations that are either express or implied in fact, and not to obligations that are "implied in law." *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); see also, *e.g.*, *Lopez* v. *A.C. & S., Inc.*, 858 F.2d 712, 714-715 (Fed. Cir. 1988), cert. denied, 491 U.S. 904 (1989); *Atlas Corp.* v. *United States*, 895 F.2d 745, 754 (Fed. Cir. 1990); *In re All Maine Asbestos Litigation*, 581 F. Supp. 963, 972 (D. Me. 1984), aff'd mem., 854 F.2d 1328 (Fed. Cir. 1988) (Table).

to additional costs and a dispute over completion of the contract. *Id.* at 133-135. The contractor sued, and this Court upheld a judgment in his favor for costs and lost profits. *Id.* at 138-139. Noting that the contractor had no knowledge of the inaccuracy in the plans and that his independent investigation of the site was adequate under the circumstances (*id.* at 134-135), the Court held that the government's "insertion [into the contract specifications] of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate." *Id.* at 137.

Spearin holds that, if the government provides detailed information or specifications on which it expects or requires a contractor to rely, if an error in those specifications makes performance under the contract more difficult than the contractor reasonably anticipated, and if the government knew more than the contractor about the part of the specifications that proves to have been inaccurate, then a court may properly infer an agreement between the parties that the government would bear any resulting increase in the cost of performance. Later cases in the *Spearin* line, including all those cited by petitioners (Pet. Br. 17-18), have likewise always involved claims that an error or defect in the government's specifications led to some unforeseen problem in the performance of the contract itself.

Thus, in *Poorvu* v. *United States*, 420 F.2d 993 (Ct. Cl. 1970), the government agreed to lease space in a building that would be built to government specifications. Against the advice of the government's architect, the plans did not include pilings to stop the building from settling. It later proved necessary to install the pilings. The Claims Court ruled that *Spearin* applied, and held the government responsible for the cost of the pilings. *Id.* at 999-1000. Although the expenses in question arose after

the completion of initial construction, they related directly to the adequacy of the building for which the government had originally contracted, and they were incurred by the contractor under a maintenance contract that was part of the original agreement.

Similarly, in *Luria Brothers & Co.* v. *United States*, 369 F.2d 701, 707-708 (Ct. Cl. 1966), a contractor recovered damages when the course of construction disclosed that the specified foundations were inadequate, requiring significant additional construction time and expense. *Laburnum Construction Corp.* v. *United States*, 325 F.2d 451, 457-458 (Ct. Cl. 1963), likewise involved construction delays and overruns caused by deficient specifications. *Ordnance Research, Inc.* v. *United States*, 609 F.2d 462, 479-480 (Ct. Cl. 1979), involved extra costs of performance resulting from explosions that occurred unexpectedly during the production of igniters for fire bombs.[10]

In this case petitioners do not claim that they were damaged because some error in the government's specifications made the manufacture of Agent Orange more difficult or expensive than they expected. Nor do they claim that such a defect caused the product, although properly manufactured, to be unacceptable to the government. Instead, they argue that the government should

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[10] Petitioners cite language from *Ordnance Research* to suggest that lower courts have recognized a "warranty of safe design" that is relevant to the facts of this case. Pet. Br. 17-18. In context, however, that language refers only to specifications that make the manufacturing process itself unsafe, making it more difficult "to produce the desired product in a satisfactory manner," and thus leading to "additional costs of performance." *Ordnance Research*, 609 F.2d at 479; see also *id.* at 480 (rejecting distinction between design flaws that interfere with production and those that lead to unacceptable end product). Indeed, we note that although the explosions at issue in *Ordnance Research* took at least one life, the claim was not for tort damages, but for "delay and increased costs" involved in completing performance under the contract. See *id.* at 464, 481.

indemnify them for the costs of litigating and settling tort suits by third parties who claimed to have been injured by the government's use of the Agent Orange that petitioners produced. As both the Claims Court and the Federal Circuit recognized (Pet. App. 18a-19a & n.8, 65a-66a, 98a-99a), accepting that argument would require a substantial expansion of the *Spearin* doctrine.[11]

B. This Court Should Not Create An Implied Warranty Of The Sort Sought By Petitioners

As noted above (see note 9, *supra*), any warranty "implied" into a government contract must represent the substance of the parties' actual agreement. The proposition that the government will bear the cost of performance delays or difficulties attributable to errors or latent flaws in its own specifications, and not caused by any fault on the part of the contractor, is a reasonable estimate of the parties' original mutual intentions. The rule that petitioners advocate, on the other hand, requires the conclu-

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[11] In addition to relying on *Spearin*, petitioners separately state (Br. 31-33) a "superior knowledge" theory for recovery. The only case cited in support of that theory involved damages for difficulties encountered in production and attributable to material omissions that made "a Government specification * * * in its context * * * actively misleading." *Helene Curtis Indus., Inc.* v. *United States*, 312 F.2d 774, 778 (Ct. Cl. 1963). *Helene Curtis* relied (*ibid.*) on *Spearin*, and it is not clear that there is any practical difference, for purposes of this case, between a "superior knowledge" theory and the requirement under *Spearin* that the government have known more than the contractor about the defective element of its specifications. To the extent there is any difference, petitioners waived their separate "superior knowledge" claim by not presenting it in their petition. See Pet. i, 10-19; U.S. Br. in Opp. 5 n.3, 10 n.7; *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 n.5 (1993). To the extent that the arguments are the same, they fail for the reasons given in the text. See also Pet. App. 15a-16a, 55a-57a, 90a-92a; *Lopez* v. *A.C. & S., Inc.*, 858 F.2d at 717-718; see also *GAF Corp.* v. *United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), cert. denied, 502 U.S. 1071 (1992).

sion that the government initially agreed to indemnify petitioners for any costs they might incur because of allegations made by third parties, whether or not ever proven, concerning product "defects" that might (as here) have nothing to do with the cost or difficulty of production required by the supply contract.

That conclusion is an unlikely one.[12] It would, by contract, vitiate governmental tort immunities that Congress and this Court have been careful to preserve. For example, as the court of appeals observed (Pet. App. 19a n.8), under *Feres* v. *United States*, 340 U.S. 135 (1950), the government is immune from tort liability for injuries to members of the armed services incident to their military service. In *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977), this Court relied on that immunity to prohibit contractors from bringing a tort suit against the government seeking indemnity or contribution for tort damages imposed because of their manufacture, under government specifications, of allegedly defective military equipment. Allowing such indirect recovery against the government would undermine *Feres*' prohibition of direct suits by service members. *Id.* at 673-674; see, *e.g.*, *In re*

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[12] Express agreements to indemnify a government contractor for open-ended liabilities are rare. See pages 39-40 & n.23, *infra*. Indeed, without invoking some specific statutory authorization, government agents would not have had the authority to agree to the indemnity urged by petitioners. Compare, *e.g.*, 42 U.S.C. 2210(d) and (h) (indemnification of nuclear contractors); 42 U.S.C. 9619 (1988 & Supp. V 1993) (President "may agree to hold harmless and indemnify" certain "response action contractor[s]" under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)); and 50 U.S.C. 1431 (President may enter into defense contracts without regard to most normal statutory restrictions) with the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(B) (1988 & Supp. V 1993) (no officer or employee may commit the government to any "contract or obligation for the payment of money before an appropriation is made unless authorized by law"); see also Pet. App. 78a-80a, 101a-103a.

"Agent Orange" Product Liability Litigation, 818 F.2d 204, 208 (2d Cir. 1987) (affirming dismissal of manufacturers' third-party claims against the government). The same reasoning applies if direct government liability is precluded by an exemption, such as that for discretionary functions, under the Federal Tort Claims Act. See *id.* at 209; see also *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 892-893 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991); cf. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511-512 (1988).[13] In light of the government's immunity from tort liability for the injuries alleged by the plaintiffs with whom petitioners settled the Agent Orange litigation, it is, as the court of appeals remarked, "difficult to envision the circumstances under which a court could find an implied-in-fact agreement on the part of the government to provide the kind of [contractual] indemnity for which [petitioners] argue." Pet. App. 19a n.8.

The warranty recognized in *Spearin* is driven in large part by the fact that when an error or defect in govern-

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[13] Compare *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), in which the Court held that the exclusive-remedy provision of the Federal Employees' Compensation Act, 5 U.S.C. 8116(c), did not bar a third-party tort indemnity action against the United States for injuries to a federal employee. *Lockheed* expressly declined to address the validity of the indemnity claim itself under applicable state law. 460 U.S. at 197 n.8, 199. The Court distinguished *Stencel Aero* on the ground that "[t]he issue in *Stencel* * * * was whether the Government's waiver of sovereign immunity in the [FTCA] applied to an indemnity action based on an injury to a serviceman"; *Stencel* held that the government retained its immunity from suit in both instances, because the *Feres* doctrine "precluded the [underlying] substantive claim without regard to any exclusive-liability provision." *Lockheed*, 460 U.S. at 197 n.8. The same reasoning applies in a case where the underlying claim is precluded by the discretionary function exception, as any claim based on military procurement decisions clearly would be. See *Boyle*, 487 U.S. at 511-512.

ment specifications makes contract performance more difficult than reasonably expected, the contractor generally has no recourse other than to seek additional compensation under the contract. In this case, on the other hand, petitioners had available to them a government contractor defense that would have provided them with full protection against unwarranted tort liability to third parties. There is no reason to revise the law of government contracts in order to provide them with the additional protection of an implied warranty that does not fairly reflect the parties' agreement.

C. The Government Contractor Defense Addresses The Situation Of Military Contractors In A Manner That Protects Both The Government's Tort Immunities And The Legitimate Interests Of Manufacturers And Tort Plaintiffs

Petitioners contend (*e.g.*, Br. 16-17) that if this Court does not adopt the rule they advocate, contractors may be "compelled" to manufacture goods to government specifications, and then unfairly be left to bear the costs of defense and settlement or liabilty if an injured plaintiff later alleges that those specifications were defective.[14] The

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[14] Petitioners refer repeatedly to government "compulsion." See, *e.g.*, Br. 12, 16, 33, 37. For present purposes we accept as true the allegation that petitioner Thompson was, from the outset, an unwilling supplier of Agent Orange. But cf. J.A. 49 n.3; *In re "Agent Orange"*, 818 F.2d at 209-210. Petitioner Hercules, on the other hand, initially "submitted and won competitive bids to supply the United States with * * * Agent Orange" in 1964. *United States* v. *Vertac Chemical Corp.*, 46 F.3d 803, 806-807 (8th Cir.), cert. denied, 115 S. Ct. 2609 (1995); see also J.A. 41-43, 48-49. Assuming that petitioners are correct (Br. 4-5) that in 1967 the government compelled Hercules, by then an established supplier, to boost its production to satisfy increased military requirements, that hardly changes a voluntarily initiated procurement relationship into a "virtual takeover" by the government (Pet. 4).

government's immunity from tort liability for the harms allegedly caused to the plaintiffs in the Agent Orange class action is fixed by doctrines that petitioners do not challenge and that are not at issue in this case. While that immunity might, on its face, appear to create the possibility of unfairness to government contractors in unusual circumstances, any such unfairness is, in fact, prevented by the availability of the government contractor defense. Invocation of that defense is fully compatible with the government's immunity, and also takes account of the legitimate interests of contractors and product-liability plaintiffs.

1. *The contours of the government contractor defense*

When Congress permitted tort suits against the United States under the Federal Tort Claims Act (FTCA), see 28 U.S.C. 1346(b), it reserved two important spheres of sovereign immunity that are relevant to this case. First, this Court has held that Congress did not intend to waive the government's immunity with respect to tort suits by members of the armed forces for injuries incident to military service. *Feres* v. *United States*, 340 U.S. 135 (1950); *United States* v. *Johnson*, 481 U.S. 681 (1987). Second, Congress expressly reserved immunity from any claim based on the exercise of (or failure to exercise) any "discretionary function or duty." 28 U.S.C. 2680(a); see, *e.g.*, *Dalehite* v. *United States*, 346 U.S. 15 (1953); *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991). The United States successfully asserted these immunities as a shield to both direct and third-party liability in the Agent Orange tort litigation. See, *e.g.*, *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 194, 199 (2d Cir. 1987), and 818 F.2d 210, 214-215 (2d Cir. 1987) (direct liability), cert. denied, 484 U.S. 1004 (1988); *id.* at 204, 206-208 (third-party liability).

The government's immunity from tort liability puts the government and contractors who manufacture military goods to government specifications in an unusual position. If the government designs and manufactures such goods for itself, it is protected from tort liability by *Feres* and the discretionary function exemption.[15] On the other hand, if a contract manufacturer is sued for injuries allegedly caused by some tortious defect in a product designed by a customer other than the United States, it can normally implead the customer as a third-party defendant. If the customer is the government and the product is one for military use, however, impleading the government is impossible. See *Stencel Aero Eng'g, supra; Sea-Land Serv., Inc., supra;* cf. *Boyle* v. *United Technologies Corp.*, 487 U.S. at 512 ("It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for production."). Yet, if the product's design was, in fact, defective, any losses would properly be the government's responsibility. In the unusual case posited (whether or not realistically) by petitioners, in which the government requires performance and dictates both design and price (so that the contractor could not, for example, pass on to the government the cost of adequate insurance), the result could be substantive unfairness to the contractor.

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[15] As this Court has explained, "the selection of the appropriate design for military equipment * * * is assuredly a discretionary function within the meaning of [the FTCA]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511. With respect to government immunity in this case, see *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 187, 191 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988); 611 F. Supp. at 1263-1264.

The courts have responded to this concern by recognizing a defense to tort actions brought against contractors by plaintiffs who claim to have been injured by products designed by and manufactured for the government. This Court confirmed the existence, basis, and contours of that defense in *Boyle* v. *United Technologies Corp.*, *supra*. In *Boyle*, 487 U.S. at 512, the Court held that government contractors may not be held liable for design defects in military equipment when:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

The *Boyle* Court explained that the first two of these conditions "assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." 487 U.S. at 511-512. Only under those circumstances does it make sense to extend to a contractor the protection from liability to which the government itself is entitled under the discretionary function exception to the FTCA. The third condition is designed to give the contractor an incentive to disclose to the government any information it might have or develop concerning risks that the government should take into account in making its design decisions. *Id.* at 512-513. In basing its holding on the government's immunity under the discretionary function exception to the FTCA, the *Boyle* Court pointed out that the defense should cover suits by civilian plaintiffs as well as suits by service members. *Id.* at 510-511. The Court also made clear that the defense protects contractors only from liability for injuries caused by designs provided or approved by the government; it does not protect against liability for injuries caused by

items that the government purchases from a supplier's normal stock, or by manufacturing or other defects that were not required by the government's specifications. *Id.* at 509.

2. *Recognition of an implied warranty in the circumstances of this case would be both redundant and counterproductive*

The government contractor defense is carefully calibrated to shield suppliers who follow government design specifications in good faith, without destroying their incentives to take care in manufacturing and to develop and share with the government information relating to risks or hazards inherent in the government's designs. There is no reason to supplement that doctrine with an implied contractual warranty, particularly where such a warranty would undermine the operation of the government contractor defense itself.

Petitioners' proposed warranty theory requires them to establish that they manufactured Agent Orange in compliance with precise design specifications devised and drafted by the government, and that the government knew more than they did about the part of the design that caused the alleged defect in the resulting product. See Pet. Br. 16-18; Pet. 12. If a contractor could establish the grounds for the existence of an implied warranty under that theory, it would also necessarily have established the elements of the government contractor defense recognized in *Boyle* (487 U.S. at 512) to any tort claim that might give rise to damages covered by the proposed warranty. Conversely, if a tort plaintiff suing a contractor succeeds in recovering damages despite the invocation of the government contractor defense, then the contractor would also be precluded from recovering from the government under petitioners' proposed warranty. Compare *In re "Agent Orange"*, 818 F.2d at 208-209 (applying

similar analysis in dismissing petitioners' third-party tort claims against the United States).

There is therefore no reason to embrace the new contract doctrine for which petitioners contend, because the government contractor defense already provides protection in appropriate circumstances. As discussed above (see pages 14-15, *supra*), the contractor in *Spearin* faced unexpected costs of contract performance because of the government's faulty plans; absent an implied contractual warranty, he would have been forced to bear costs for which the government was properly responsible. Here, in contrast, the contractors face no loss that is attributable to the government. Because of the government contractor defense, they were protected from any liability that would have fallen on the government but for the latter's reservation of sovereign immunity with respect to its discretionary procurement decisions. On the other hand, if the government contractor defense did not preclude liability, that result would have been based on a finding that the liability-causing product defect resulted from their actions, rather than from a discretionary decision on the part of the government.

Recognition of an implied warranty in addition to the government contractor defense is not only unnecessary, it would also undermine the functioning of the defense, which is designed to protect the tort immunity that Congress has reserved with respect to the government's discretionary military procurement decisions. See *Boyle*, 487 U.S. at 511-513. Contractors are protected from tort liability for government designs primarily because, if they were not, such liability would ultimately be passed on to the government through higher contract prices, thus indirectly imposing on the government liability that cannot be imposed directly. *Id.* at 511-512. Recognition of petitioners' "implied warranty" theory, however, would have much the same effect by imposing such liability whenever

a contractor declines to advance, or settles in spite of, the available government contractor defense to tort liability.

In many circumstances, the availability of petitioners' proposed warranty action would reduce or eliminate the contractor's incentive to assert or press the government contractor defense as a bar to liability in tort. It might instead be in the contractor's interest to cap its exposure by settling, rather than defending, the tort case, and then to sue the government for indemnification. If that indemnification action were successful, the contractor would be as well off as if it had successfully asserted the government contractor defense in the tort action, and it would have had to prove essentially the same facts. The public purpose of the defense would have been frustrated, however, because the government would have been forced to pay for tort injuries for which it could not have been held directly liable. A settling contractor whose contract-law indemnification action against the United States failed would also be no worse off than if it had litigated the tort action, because the same factors that led to the failure to obtain indemnity would presumably also have led to a failure to establish the government contractor defense. Such a contractor might, in addition, be substantially better off than if it had litigated the tort claims, because the tort settlement would have capped its potential liability. In sum, petitioners' proposed new warranty would inappropriately give government contractors the power to protect themselves, at the government's expense, by creating indirect governmental liability to plaintiffs who could not have recovered directly against the government.

3. *Petitioners' objections to reliance on the government contractor defense do not justify the result they seek in this case*

Petitioners argue (Br. 20) that the Court should not rely on the existence of the government contractor de-

fense in this case, because the "status and parameters" of that defense were "uncertain" in 1984, when petitioners settled the Agent Orange class actions. Any uncertainties in the law that may have existed in 1984, however, provide no basis for rewriting government contract law in 1995, when the relevant tort law questions have been settled in a way that makes petitioners' proposed warranty both unnecessary and unwise. In any event, there was in fact no relevant uncertainty in the law when the class action was settled. The government contractor defense had clear roots in this Court's decision in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), and a number of courts applied it in one form or another (any of which would have provided adequate protection to petitioners) before this Court provided the definitive articulation in *Boyle*.[16]

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[16] See Pet. App. 77a, 113a; Pet. Br. 20 and cases there cited; *Sanner* v. *Ford Motor Co.*, 364 A.2d 43, 44-47 (Super. Ct. Law Div. 1976), aff'd, 381 A.2d 805 (Super. Ct. App. Div. 1977), cert. denied, 384 A.2d 846 (N.J. 1978); *Casabianca* v. *Casabianca*, 428 N.Y.S.2d 400 (Sup. Ct. 1980); *Bynum* v. *FMC Corp.*, 770 F.2d 556, 577-578 (5th Cir. 1985); *Boruski* v. *United States*, 803 F.2d 1421, 1430 (7th Cir. 1986); see also *Mitchell* v. *Lone Star Ammunition, Inc.*, 913 F.2d 242, 245 (5th Cir. 1990) (*Boyle* "had little effect on the existing law in this Circuit"). Petitioners cite (Br. 20) two cases for the proposition that some jurisdictions had rejected the government contractor defense entirely. Neither case supports that argument. In *Hansen* v. *Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1045 (5th Cir. 1984), cert. denied, 470 U.S. 1051 (1985), the court, in the absence of relevant Texas cases, recognized a "government specification defense," but concluded that the defense would not apply in that case because only a small portion of the asbestos exposure involved was linked to government contracts. *In re All Maine Asbestos Litigation*, 575 F. Supp. 1375, 1377 (D. Me. 1983), *denied* the plaintiff's motion to strike the government contractor defense, noting that the plaintiffs had "not shown that Maine law would unequivocally reject such a defense." See also *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1151-1152 (N.D. Cal. 1982) (recognizing a "government specification defense").

Most important, the availability of the defense was clearly the law of the Agent Orange tort cases. As the Federal Circuit pointed out below (Pet. App. 22a), every court that participated in the tort litigation ultimately concluded, not only that the government contractor defense was available, but that it protected petitioners from liability. The district court initially granted summary judgment for petitioners on that basis.[17] Chief Judge Weinstein retracted that judgment after assuming responsibility for the case, see Pet. App. 7a, but he discussed the potential applicability of the defense in approving the class action settlement agreement, see 597 F. Supp. at 795-799, 843-850, and he later relied on its applicability in dismissing the claims of the plaintiffs who had opted out of the settlement. 611 F. Supp. 1263-1264 ("Plaintiffs are unable to overcome defendants' government contract defense."). The Second Circuit affirmed in each instance; indeed, it based its decision with respect to the opt-out plaintiffs solely on the government contractor defense. See 818 F.2d at 173-174 (settlement opinion) (defense a "final and in our view impossible, hurdle to surmount"); *id.* at 189-194 (opt-out opinion), 192 ("We need not define the precise contours of the defense because we believe that under any formulation * * * the defendants here were entitled to summary judgment."). See also *id.* at 209 (opinion on manufacturers' third-party tort claims against the United States); *Ivy* v. *Diamond Shamrock Chemicals Co. (In re "Agent Orange" Product Liability Litigation)*, 996 F.2d 1425, 1436-1437 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994). The history of this litigation thus provides solid support for the Federal Circuit's conclusion that "there can be no serious doubt that had the class action Agent

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[17] See *In re "Agent Orange"*, 506 F. Supp. at 796 (indicating willingness to invoke defense if elements were proved); *In re "Agent Orange"*, 565 F. Supp. at 1272-1274 (granting judgment for petitioners).

Orange litigation proceeded to termination, no liability would have been imposed against [petitioners]" because of the government contractor defense. Pet. App. 23a.

Petitioners argue that "litigation is inherently uncertain" (Br. 21), and that "[e]ven when a government contractor has every reason to expect to be vindicated by the government contractor defense, it still is possible for the defense to fail" (Br. 25). Those observations provide no basis for imposing liability on the United States. It is clear that the government bore no liability to the Agent Orange tort plaintiffs, because of its tort immunities.[18] Petitioners, on the other hand, manufactured Agent Orange, and there were legitimate questions about their potential tort liability, including their knowledge about the hazards of dioxin, their choice of manufacturing methods, their responsibility for the presence of dioxin in the Agent Orange that they produced, and the applicability of the government contractor defense to them in light of their knowledge and manufacturing decisions. See, *e.g.*, J.A. 57-71.

Dealing with such uncertainties and establishing the absence of legal liability are ordinary burdens of engaging in a manufacturing business, and petitioners suggest no basis for shifting those burdens to the government. If it were not for a change in judges in the district court (see

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[18] The government was, however, required to expend considerable resources establishing that proposition in the courts, including defending against the third-party tort claims brought against it by petitioners and other manufacturers. See, *e.g.*, *In re "Agent Orange"*, 597 F. Supp. at 257-258. Moreover, the district court's "repeated changes of heart" (Pet. Br. 21) affected the government as well as petitioners: The government had summary judgment in its favor partially revoked—at petitioners' behest—and was ordered to trial, with the prospect of an advisory jury to consider all possible claims against it. *In re "Agent Orange"*, 580 F. Supp. at 1256. The government, however, declined to participate in the settlement for which petitioners now seek indemnity, and its position was ultimately sustained by both the district court and the court of appeals.

Pet. App. 7a), petitioners would apparently have obtained summary judgment in their favor after initial discovery in the class action litigation, as numerous other contractors have in similar situations both before and after *Boyle*.[19] When the initial grant of summary judgment was retracted, petitioners faced a choice whether to settle, as they did, or to continue to assert the absence of any liability, as did the government. Every available indication is that, if they had taken the latter course, the courts were prepared to apply the government contractor defense so long as its factual predicates were satisfied. The risk of an unfavorable legal outcome in such a situation (see, *e.g.*, Pet. Br. 18-19) is one either to be absorbed as a cost of doing business, or to be covered through the acquisition of insurance. Cf. *Stencel Aero Eng'g*, 431 U.S. at 674 & n.8. The same is true of attorneys' fees, which, in the absence of some specific legislative direction to the contrary, lie where they fall. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Parties to a contract may reallocate these business risks through express indemnities. But the government agreed to no such reallocation in the contracts at issue here, and, for the reasons discussed above, there is

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[19] See, *e.g.*, *Tate* v. *Boeing Helicopters*, 55 F.3d 1150, 1156 (6th Cir. 1995); *Landgraf* v. *McDonnell Douglas Helicopter Co.*, 993 F.2d 558, 564 (6th Cir.), cert. denied, 114 S. Ct. 553 (1993); *Lewis* v. *Babcock Indus., Inc.*, 985 F.2d 83, 88-89 (2d Cir.), cert. denied, 113 S. Ct. 3041 (1993); *Stout* v. *Borg-Warner Corp.*, 933 F.2d 331, 337 (5th Cir.), cert. denied, 502 U.S. 981 (1991); *Kleemann* v. *McDonnell Douglas Corp.*, 890 F.2d 698, 700 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990); *Smith* v. *Xerox Corp.*, 866 F.2d 135, 141 (5th Cir. 1989); *Nicholson* v. *United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988); *Boruski* v. *United States*, 803 F.2d at 1430; *Bynum* v. *FMC Corp.*, 770 F.2d at 577-578; *Tillett* v. *J.I. Case Co.*, 756 F.2d 591, 600 (7th Cir. 1985); *Koutsoubos* v. *Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), cert. denied, 474 U.S. 821 (1985); *Casabianca* v. *Casabianca*, *supra*; *Sanner* v. *Ford Motor Co.*, 364 A.2d at 44-47.

no reason to believe that such a reallocation was implicit in the procurement relationship.[20]

D. Petitioners Could Not Show That The Government Breached Any Warranty That Might Be Implied

Finally, even if the Court were to create an implied warranty for petitioners' benefit in the circumstances of this case, petitioners still could not recover. As the Claims Court pointed out (Pet. App. 64a-65a, 96a-97a), despite the "many and varied decisions regarding the veterans' suits against the herbicide manufacturers" (*id.* at 65a, 97a), no court has ever found credible evidence that exposure to Agent Orange caused any of the injuries complained of by the individual tort plaintiffs. That court therefore held that, even if petitioners were accorded the warranty they propose, they could not prove that it had ever been breached.[21]

We note, to begin with, that even if there were a demonstrable link between the tort plaintiffs' injuries and exposure to dioxin in Agent Orange, petitioners incor-

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[20] As noted above (see note 12, *supra*), express indemnity agreements in government procurement contracts are extraordinary. Petitioners have cited no statutory authorization under which the government could have agreed to such an indemnity; and even if such authorization existed, it is implausible that it would have been invoked by implication, and not reduced to writing. Compare discussion of 50 U.S.C. 1431 at pages 39-40 & n.23, *infra*. The absence of any indemnity agreement renders much of petitioners' discussion of rules developed in the context of such agreements, including rules concerning the "reasonableness" of settlements and the existence of "actual" or "potential" liability (Br. 22-28), of marginal relevance to the issue in this case, which is whether an indemnity agreement should be implied at all.

[21] The Federal Circuit indicated general agreement with the Claims Court's decision on this point, but it did not pass on the issue. Pet. App. 15a, 18a-19a. The conclusions of the courts that considered the Agent Orange tort litigation are clear, however. The Court could therefore affirm the judgment below on this ground, which the government raised and pressed in the court of appeals (see, *e.g.*, Gov't C.A. Br. 37-47). See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 29-30 (1984).

rectly take it as established (see Br. 13, 18 n.5) that the government's specifications for Agent Orange required them to produce a product containing dioxin. As the United States pointed out to the district court in New York in arguing that the government contractor defense issue in the opt-out cases should not be resolved on summary judgment (J.A. 39-41; see page 6 n.4, *supra*), the government's orders for Agent Orange specified only the nature and proportions of its chemical components, herbicides known as 2,4,5-T and 2,4-D. See Pet. App. 3a. The orders mentioned nothing about dioxin, which is an impurity that may or may not be found in 2,4,5-T, depending on how the latter is produced. *Ibid.*; see J.A. 40. Each manufacturer was free to use its own method for producing 2,4,5-T, which each petitioner also made for use in its commercial herbicides. See Pet. App. 3a-4a. Indeed, when Hercules became concerned about dioxin levels in its Agent Orange, it changed its production methods to eliminate them. *Id.* at 4a. If this case were remanded for trial, it is therefore unlikely that petitioners would be able to show that the government's specifications for Agent Orange were "defective."

In addition, the courts that considered the merits of the Agent Orange tort litigation, like the Claims Court in this case, concluded that no link could be shown between the tort plaintiffs' injuries and exposure to dioxin or Agent Orange. Chief Judge Weinstein, who expressed considerable sympathy for the veteran plaintiffs (see, *e.g.*, *In re "Agent Orange"*, 597 F. Supp. at 857), nonetheless approved settlement of their claims in part because he thought their case probably "without merit," *ibid.*, in view of the fact that "an enormous scientific effort to be helpful on causation ha[d], from the plaintiffs' point of view, left the case at best open" (*id.* at 795). In later granting summary judgment against those plaintiffs who opted out of the settlement, the Chief Judge observed that "years of discovery and tens of millions of

dollars spent by the government and others on research ha[d] not yielded any competent evidence indicating a genuine issue of fact about causation." *In re "Agent Orange"*, 611 F. Supp. at 1260. That conclusion was twice echoed by the Second Circuit. *In re "Agent Orange"*, 818 F.2d at 171-173 (opinion approving settlement), 193-194 (opinion approving dismissal of "opt-out" plaintiffs' claims). Nor has the passage of time produced any new evidence that calls those courts' conclusions into question. See *Ivy* v. *Diamond Shamrock Chemicals Co. (In re "Agent Orange" Product Liability Litigation)*, 996 F.2d at 1436-1437 (reviewing recent evidence and refusing to reopen settlement); *American Legion* v. *Derwinski*, 54 F.3d 789, 790 (D.C. Cir. 1995) (upholding VA's decision to terminate study of Agent Orange effects based on determination by Centers for Disease Control that "sampling problems made it unlikely that the investigation would yield scientifically valid results").

In all previous litigation, petitioners themselves have argued that the Agent Orange tort plaintiffs could establish no causal connection between exposure to dioxin in Agent Orange and any of the injuries for which the plaintiffs sought compensation. If so, there is no way in which the government's specifications could have been "defective," even if the specifications had required the manufacture of compounds containing dioxin (which they did not). Petitioners now argue that the specifications "were defective because they resulted in a product that contained dioxin, the substance that *the Agent Orange plaintiffs claimed* caused their injuries." Pet. Br. 13 (emphasis added); see also *id.* at 9, 18. But government specifications certainly are not "defective" when they actually caused or threatened no harm, merely because of allegations about cause and effect made by third parties in litigation (and ultimately rejected by every court to consider the question).

II. THE DEFENSE PRODUCTION ACT DOES NOT ESTABLISH AN IMPLIED AGREEMENT TO INDEMNIFY GOVERNMENT CONTRACTORS

Petitioners contend (Br. 33-41) that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, and the government's "compulsion" of petitioners' Agent Orange production under the DPA, together "create an implied-in-fact agreement to indemnify petitioners for the damages they suffered in the Agent Orange litigation." Petitioner Hercules did not advance that claim either in the Claims Court or in the court of appeals (see U.S. Br. in Opp. 20-21), and it is therefore properly before the Court only on behalf of petitioner Thompson. See Pet. App. 14a-15a, 28a. Both courts below correctly rejected Thompson's argument. Pet. App. 28a-33a, 100a-102a.

A. Section 707 Of The DPA Shields Contractors Only From Liability To Customers Whose Orders Are Displaced Or Delayed By The Priority Accorded Government Orders Under Section 101

The court of appeals correctly held (Pet. App. 29a-33a) that the language and statutory context of Section 707 show that it protects contractors from claims arising out of a DPA order's displacement of work for other customers, not from tort liability to parties who claim to have been injured by products manufactured for the government. Section 101(a)(1) of the DPA, 50 U.S.C. App. 2071(a)(1) (1988 & Supp. V 1993) (emphasis added), authorizes the President

> to require that performance under [defense] contracts or orders * * * shall take *priority over* performance under any other contract or order, and, *for the purpose of assuring such priority*, to require acceptance and performance of such contracts or orders *in preference to other contracts or orders* by any person he finds to be capable of their performance.

Thus, a party performing a contract under the DPA may be required to give government orders priority over other orders. That requirement, however, might subject the contractor to suit by other customers for breach of contract (or perhaps on some theory of interference with business advantage or other illegal or tortious conduct). To address that possibility, Section 707 (50 U.S.C. App. 2157) complements the core directive of Section 101 by providing that:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act * * *, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned * * * under any rule, regulation, or order * * * by charging higher prices * * * or in any other manner.

Construing these two provisions together, the court of appeals concluded (Pet. App. 31a-32a) that Congress did not intend Section 707 of the Act to confer an immunity broader than the risk imposed by Section 101. Thompson does not dispute that general proposition. See Pet. Br. 35-36. It contests only the court's further conclusion that "while the risk imposed by section 101 does include the possible need of a contractor to break its contracts with third parties in order to give preference to a DPA contract, it does not include the risk that the product produced under the DPA contract will be inherently unsafe to users." Pet. App. 31a.

The court's conclusion is supported by the language of Sections 101(a) and 707, which refer repeatedly to the "priority" and "preference" to be accorded to DPA orders, but which say nothing about liability arising from the

character of the goods to be provided under the DPA contract, or about displacing the normal rules that would otherwise govern responsibility for the proper design and manufacture of those goods. As Chief Judge Weinstein noted in rejecting petitioners' Section 707 claim while approving the settlement of the underlying tort cases, there is generally "no logical connection between the compulsion of section 101 and the risk of injuries to those using or exposed to the contractor's product; the risk is something that all government contractors have in common[,] and is already taken into account in the government contract[or] defense." 597 F. Supp. at 845.

Moreover, in Thompson's view the protection of Section 707 would apparently extend to *any* legal liability that a contractor might otherwise incur "by virtue of [its] performance of [a DPA] contract" (Pet. Br. 36), presumably including liability for the violation of any law otherwise applicable to the contractor's (or the government's) operations or products. Compare *United States* v. *Vertac Chemical Corp.*, 46 F.3d 803, 811-813 (8th Cir.), cert. denied, 115 S. Ct. 2609 (1995) (rejecting petitioner Hercules' argument that Section 707 immunized it from liability under federal environmental law). While it is not inconceivable that Congress might enact such broad protection in some circumstances, it is extremely unlikely that it would do so in an ambiguous manner and without extensive consideration and debate. Cf. *In re "Agent Orange"*, 597 F. Supp. at 845 ("[I]t is unlikely that Congress would work such a major change in tort law without being explicit about it."). Thompson's interpretation of Section 707 is therefore considerably more "strained" (Pet. Br. 36 n.15) than that adopted by the court of appeals.

The legislative history sheds little additional light on the meaning of Section 707. The Section's statutory precursor explicitly limited its protection to "damages or penalties for any default under any contract or order"

resulting from compliance with a government production order. Second War Powers Act of 1942, ch. 199, § 301, 56 Stat. 177. The DPA itself dropped that language, but the relevant committee reports provide no explanation for the change.[22] When Congress amended Section 707 in 1952, the Senate report noted that the provision "protects a person from liability, under contract or otherwise, as the result of compliance with the act," and "was included to encourage and assist people to comply with the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases." S. Rep. No. 1599, 82d Cong., 2d Sess. 29 (1952). The amendment deleted the word "his" from the phrase "resulting from [his] compliance," thus clarifying that "the protection applies to cases where the liability is caused by the compliance of another person, for example, where a contractor is unable to carry out a contract because his suppliers are prohibited from making or shipping him the parts he needs to carry out the substance." *Ibid.* That change, and the Committee's explanation, make it clear that Section 707 was intended to provide broad protection against liability for government-caused disruptions in existing business-customer relationships; they do not suggest that it was intended to go further and immunize a DPA contractor for the violation of otherwise applicable legal duties relating to the manufacture of the product procured by the government. Cf. *Boyle*, 487 U.S. at 508-509 (discussing contractor's appropriate responsibility in tort for product features not dictated by government design decisions).

For these reasons, every court that has considered the matter has, like the courts below, rejected the argu-

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[22] See S. Rep. No. 2250, 81st Cong., 2d Sess. 11 (1950); H.R. Rep. No. 2759, 81st Cong., 2d Sess. 22 (1950); H.R. Conf. Rep. No. 3042, 81st Cong., 2d Sess. (1950).

ment that Congress intended the DPA's protection to sweep as broadly as Thompson claims. See *United States* v. *Vertac Chemical Corp.*, 46 F.3d at 811-813; *In re "Agent Orange"*, 597 F. Supp. at 845; *Eastern Air Lines, Inc.*, v. *McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976); *In re Aircraft Crash Litigation, Frederick, Maryland, May 6, 1981*, 752 F. Supp. 1326, 1330 n.2 (S.D. Ohio 1990), and cases cited therein. To the extent the scope of Section 707 is relevant to the disposition of this case, this Court should reach the same conclusion.

B. Whatever The Proper Scope Of Section 707, It Creates No Implied Contractual Indemnity By The Government

There is, however, no need for the Court to decide the precise scope of Section 707 in this case. No matter how broad the statute's protective sweep, Thompson's argument (Br. 37-40) that the statute supports finding an implied-in-fact agreement by the government to *indemnify* DPA contractors for the cost of litigating and settling product liability claims brought by third parties is wholly implausible.

Whatever its scope, Section 707 is plainly intended only to provide a defense to liability in lawsuits brought against a DPA contractor (or, as the 1952 amendment makes clear, any party whose normal commercial activities have been impeded by another party's compliance with a DPA order). Indeed, petitioners raised Section 707 as a defense to liability in the Agent Orange class action litigation. See *In re "Agent Orange"*, 597 F. Supp. at 843-845. They settled that action, however, thereby foregoing any opportunity to challenge on appeal the district court's ultimate rejection (*ibid.*) of their interpretation of Section 707. Final approval of the settlement agreement mooted any question of the application of that Section to petitioners' situation.

Even Thompson admits (Br. 40) that its attempt to resurrect that question in this contract litigation is "strained." Neither Section 707 itself, nor its legislative history, says or suggests anything about indemnification by the United States. Thompson is therefore forced to argue (Br. 37, 39) that a government order under the DPA gives rise to an implied-in-fact indemnity agreement. As in the case of petitioners' proposed implied warranty, the Court may find such an implied-in-fact agreement only if it reflects the actual mutual intentions embodied in the parties' original agreement. See note 9, *supra*. Thompson cannot make that showing here.

First, Congress provided whatever protection it thought appropriate for DPA contractors by enacting the shield provision of Section 707. There is no reason to think that Congress intended that explicit shield to be supplemented with an implied governmental indemnity for cases in which Section 707 itself did not prevent the imposition of liability—whether because it was not invoked, because it was held not to cover the liability in question, or because the contractor chose to forgo or compromise its Section 707 protection in settling a particular action. As noted above (see note 12, *supra*), when Congress intends to authorize indemnification agreements on the part of the government, it does so explicitly; indeed, if Congress does not give such explicit authorization, it has elsewhere expressly *prohibited* government officials from entering into the sort of open-ended assumptions of liability that an indemnity entails. Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(B) (1988 & Supp. V 1993); see Pet. App. 101a-103a; see also *Johns-Manville Corp.* v. *United States*, 12 Cl. Ct. 1, 21-25 (1987), vacated on other grounds, 855 F.2d 1571 (Fed. Cir. 1988); *California-Pacific Utilities Co.* v. *United States*, 194 Ct. Cl. 703, 715 (1971), and cases there cited; *In re Assumption by Government of Contractor Liability to Third Persons—Re-*

consideration, 62 Comp. Gen. 361 (1983).[23] Thus, as the court of appeals observed (Pet. App. 32a-33a), "if Congress had intended section 707 to impose upon the government the kind of liability asserted by Thompson, it would have said so in clear and unequivocal terms."

Moreover, as in the case of petitioners' implied warranty argument, recognition of an implied indemnity based on the DPA would undermine the operation of the government contractor defense and the government's tort-law immunities. If petitioners' view prevailed, the costs of any lawsuit brought against a contractor providing a

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[23] Thompson argues (Br. 40-41) that the indemnity it seeks "falls outside the scope" of the Anti-Deficiency Act because it "is not an express contractual provision" and "arises from the powers of the court," rather than from the "powers" (or agreement) of any government agent. That candid description of petitioner's theory describes a provision that would be implied "at law," not the sort of implied-in-fact agreement that petitioner must allege in order for the courts to have jurisdiction over its "contract" claim against the government. See note 9, *supra*. In any event, as the Claims Court recognized (Pet. App. 102a), restrictions on the contracting authority of government agents apply to all contractual obligations, whether express or implied. See, *e.g.*, *Sutton* v. *United States*, 256 U.S. 575, 580 (1921). Petitioner's elliptical attempt (Br. 41 n.18) to rely on the only statutory indemnification provision potentially relevant to the Agent Orange contracts, the authority conferred on the President in 50 U.S.C. 1431 to bypass normal contracting rules in order to "facilitate the national defense," only underlines the fact that petitioner never sought or received an indemnity under that authority. See, *e.g.*, *ibid.* (requiring special approval for obligations in excess of $50,000); Armed Servs. Procurement Reg. No. 43 ("Extraordinary Contractual Actions to Facilitate the National Defense"), ¶ 17-206 (ii) and (iii) (1959); 32 C.F.R. 17.206(b) and (c) (Supp. 1960) (C.A. App. 759-764) (contracts containing authorized provisions are to include statement of circumstances, justification, and finding that action will facilitate national defense); Exec. Order No. 10,789, 3 C.F.R. 72 (Supp. 1958) (*reprinted* following 50 U.S.C. 1431) (requiring (at ¶ 6), *inter alia*, annual report to Congress of each action taken under authority of Section 1431).

product pursuant to the DPA would be passed through to the United States through indemnification, regardless of the culpability of the contractor. That result would not only vitiate the government's immunity, it would destroy the contractor's incentives, carefully preserved by this Court's decision in *Boyle*, 487 U.S. at 509-513, to conduct its own operations carefully and to inform the government of any product risks of which it is aware.

The cases that Thompson cites (Br. 37-39) in support of its implied indemnity argument are largely inapposite to this case. In *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 133-134 (1956), for example, the Court held that a stevedoring contractor had breached its contractual obligation to stow cargo safely and competently, and that it was therefore responsible for tort damages paid by the shipowner to one of the stevedore's employees because of an accident caused by the breach. In this case, petitioners allege a breach of contract by their customer, not their supplier; neither the "manufacturer's warranty of the soundness of its manufactured product" (*id.* at 133-134), nor any other obligation going to the "essence" of Thompson's performance under its supply contract (*id.* at 133), is at issue. Thompson also cites *Space Age Eng'g, Inc.* v. *United States*, 4 Cl. Ct. 739, 742 (1984), for the proposition that "reliance upon a statutory provision is a well-established basis for implied-in-fact contract actions against the United States"; but *Space Age* involved an implied condition of government bid requests that responses will be "fairly and honestly considered" (*id.* at 741), and the language Thompson quotes (Br. 38 n.16) indicates that *violation* of a statute or regulation by a government procurement officer may be used to show *breach* of that implied obligation. No such violation is alleged here.[24]

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[24] In *Johns-Manville Sales Corp.* v. *United States*, 622 F. Supp. 443, 449-450 (N.D. Cal. 1985), which Thompson cites (Br. 39 n.17) to suggest that government control over a contractor's operations

Travelers Insurance Co. v. *United States*, 493 F.2d 881 (3d Cir. 1974), and *Michigan Wisconsin Pipeline Co.* v. *Williams-McWilliams Co.*, 551 F.2d 945 (5th Cir. 1977), are more relevant to the issues in this case, but neither provides substantial support for the result that Thompson seeks. *Travelers* was a tort suit brought under the FTCA. The court dismissed the FTCA claims, but remanded the case because further factual development "might show contractual responsibility of the [government] so that there would be a basis for recovery under an implied contractual right to indemnification." 493 F.2d at 888. The court further suggested, however, that the district court might not even have jurisdiction to consider that theory of contractual liability. *Ibid.* The opinion's passing speculation about issues not before either it or the court whose decision it was reviewing carry little weight.

Michigan Wisconsin was an admiralty case (551 F.2d at 949), and the court's opinion relies in part on tort principles. See, *e.g.*, *id.* at 951-952 & n.5. The court there relied on this Court's pre-*Spearin* decision in *Hollerbach* v. *United States*, 233 U.S. 165 (1914), for the proposition that a contractor is entitled to recover excess costs of performance caused by affirmatively misleading representations made by the government in letting the contract; and it extended that proposition to hold the government liable for damages caused by a contractor to the property of a third party. *Michigan Wisconsin* involved, however, a determination that the plans provided by the government to its dredging contractor amounted to an affirmative misrepresentation; and the damages involved were caused, as a result of that misrepresentation, during the actual performance of the contract. In the present

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could produce an implied indemnity, the court replied to the government's jurisdictional objections by holding that the case before it was not a contract case, but rather one alleging tort liability under California law.

case, in contrast, the government's orders for Agent Orange contained nothing that could be construed as an affirmative misrepresentation, and the tort claims for the settlement of which Thompson seeks reimbursement arose years after successful completion of the contract.

For all these reasons, the courts below correctly rejected Thompson's attempt to assert an implied indemnity founded on Section 707 of the DPA. Any other result would plainly go far beyond what Congress has authorized in the DPA and what the parties could have intended in their agreement.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HERCULES INCORPORATED
and
WM. T. THOMPSON COMPANY,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF OF PETITIONERS

This Court granted certiorari to review the holding of the court of appeals that the government incurred no contractual liability to petitioning manufacturers when "the Government compel[led] manufacture of a product by private companies, a product known to the Government to be potentially dangerous, and the use by the Government of the product cause[d] the manufacturers to incur liability." (Pet. App. 34a-35a (Plager, J., dissenting)).

The majority below held that there was no liability because the government's breach of its contractual obligations supposedly did not "cause" petitioners' injury. Instead, with the benefit of 20-20 hindsight, the court of appeals opined that petitioners would not have lost the Agent Orange litigation had they proceeded to trial. Accordingly, the court of appeals concluded that the decision of petitioners to settle claims potentially worth billions of dollars after the denial of their summary judgment motion and on the eve of trial was a voluntary gift to the Agent Orange plaintiffs.

The best evidence available that the decision below is insupportable is the lack of reliance placed upon that holding by the United States in urging affirmance. Instead of defending the "causation" holding of the court of appeals, the government makes several alternative arguments as to why petitioners should not be allowed to assert a claim for breach of warranty or for indemnification in the circumstances of this case. These arguments, however, plainly do not withstand scrutiny on the record in this case and are undermined in significant measure by the government's own concessions.

Specifically, the government effectively concedes the essential elements of both petitioners' claim for a breach of the warranty of specifications recognized by this Court in *United States v. Spearin*, 248 U.S. 132 (1918), and petitioners' claim under the superior knowledge doctrine. *See Helene Curtis Indus. v. United States*, 312 F.2d 774 (Ct. Cl. 1963). First, the government has conceded

throughout this litigation that it prepared and issued the specifications for Agent Orange. Second, the government does not dispute that the Agent Orange manufactured by petitioners complied with those specifications. Third, the government does not dispute that the government had knowledge that the manufacture of Agent Orange pursuant to the government's specifications would generate dioxin as a by-product. Fourth, the government does not dispute that dioxin is hazardous and capable of causing personal injuries.

Having made such key concessions, the government is reduced to arguing that petitioners' warranty claims should not be recognized as a matter of public policy. However, the government fails to identify any legitimate interest or protection of the government that would be offended by the recognition of a *Spearin* claim in the circumstances of this case. On the contrary, the public interest would be served only if petitioners are permitted to assert such a claim here.

Just as a warranty must be and should be implied under *Spearin*, so too should an indemnification obligation be implied as a consequence of petitioners' compliance with the government's orders under the Defense Production Act ("DPA") and the other circumstances surrounding the compelled production of Agent Orange. Petitioners do not attempt to interpret the DPA's hold harmless language as an affirmative indemnity. Rather, petitioners contend that an indemnity should be implied from all of the circumstances of this case, including the circumstance that petitioners and the government contracted against the backdrop of the sweeping hold harmless language contained in the DPA.

Not only does the government's brief effectively concede the fundamental legal soundness of the three interrelated theories that petitioners rely upon for relief, but the government's brief also shows that summary judgment was wholly premature in this case because petitioners' contract theories necessarily are fact-bound and cannot be resolved against petitioners, as was done here,

without a full factual record developed through discovery. Thus, by conceding that there is "the possibility of unfairness to government contractors in [the] unusual circumstances," alleged by petitioners, the government concedes that it is necessary to have a fully developed factual record in order to determine whether this dispute involves just such "unusual circumstances." (Gov. Br. at 21).

Indeed, if the undisputed facts involving petitioners' compelled production of Agent Orange do not show extraordinary "unfairness," then the concept has no meaning. Among other things, the President ordered both Thompson and Hercules to produce Agent Orange on pain of civil and criminal penalties. A direct appeal by Thompson's president to the Department of Defense fell on deaf ears. Both Thompson and Hercules eventually were ordered to divert all of their relevant resources to manufacturing Agent Orange and were never told by the government about the hazards of producing the defoliant as specified by the United States, even though the government had long been aware of those hazards.

When Thompson and Hercules were sued by Vietnam veterans exposed to Agent Orange, the government never supported the argument that they should be shielded from liability. Instead, the government sat by and watched petitioners expend millions of dollars, first in litigation costs and then in a settlement on the eve of trial to avoid even further expense and the risk of ruinous liability. To the extent that the government became involved at all in petitioners' efforts to defend themselves in the Agent Orange litigation, it was an opponent, first seeking to limit discovery on crucial elements of the government contractor defense and later claiming that the defense was unavailable. At the end of this process, Thompson became insolvent; it currently does no business and its only real asset is this lawsuit. Hercules, while not insolvent, suffered significant financial losses. The government's argument that Thompson and Hercules are not even entitled to discovery under these "unusual" circumstances is appalling.

I. THE GOVERNMENT OFFERS NO PERSUASIVE REASON FOR DISMISSING PETITIONERS' *SPEARIN* CLAIM ON THE RECORD IN THIS CASE

A. The Government's Refusal To Defend the Holding Below and the Government's Concessions Demonstrate That Petitioners' *Spearin* Claim Is Viable

According to the court below, because of the government contractor defense, "there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed against [petitioners]". (Pet. App. 23a). Principally on this basis, the court of appeals held that the government was not liable for breach of warranty because petitioners "volunteered" to settle the *Agent Orange* class action rather than go to trial and rely upon the government contractor defense to protect them from any and all harm.

Petitioners demonstrated in their opening brief the fundamental error in the court of appeals' reliance on hindsight to justify the dismissal on summary judgment of petitioners' breach of contract claims. (Pet. Br. at 19-22). In response to that showing, the government contradicts itself. Initially, the government purports to defend the court of appeals' ruling by stating that "the history of this litigation thus provides solid support for the court of appeals' conclusion that 'there can be no serious doubt that had the class action *Agent Orange* litigation proceeded to termination, no liability would have been imposed against [petitioners]' because of the government contractor defense." (Gov. Br. at 28).[1]

In the very next paragraph, however, the government abandons any pretense of defending the court of appeals'

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[1] At one point, the government goes so far as to suggest that "the availability of the defense was clearly the law of the Agent Orange tort cases." (Gov. Br. at 28). Such a suggestion is absurd in light of the fact that, at the time petitioners settled in 1984, petitioners had failed to obtain summary judgment on the government contractor defense and the court had ruled that the issue would be decided by the jury.

ruling and concedes outright that petitioners had no guarantee in 1984 that the government contractor defense would have avoided the imposition of liability. Specifically, the government states that "there were legitimate questions about [petitioners'] potential tort liability, including . . . the applicability of the government contractor defense to them in light of their knowledge and manufacturing decisions" (Gov. Br. at 29).

This latter admission by the government accurately reflects just how much "doubt" existed in 1984 as to the availability of the government contractor defense in the Agent Orange litigation. Indeed, just months after petitioners settled the Agent Orange class action in 1984, the government made a similar assessment of the ability of the government contractor defense to protect petitioners. At that time, the government argued that "there exists substantial and convincing evidence that establishes not only that there are indeed genuine issues of material fact directly bearing on the validity of each and every contention relating to the government contract defense, but also that the defense does not further the policies it purports to serve." (J.A. 36).[2]

While the government asserts that any uncertainty in the elements of the government contractor defense was not "relevant," that assertion is valid (if at all) only with the benefit of hindsight. In 1984, when petitioners decided to settle, petitioners had no guarantee that this Court ultimately would recognize a government contractor defense and, if so, what elements it would contain. Contrary to the United States' assertion, this uncertainty was quite "relevant" to petitioners at that time, and it made their decision to settle eminently reasonable.

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[2] Notably, the Brief Amicus Curiae of the Agent Orange Coordinating Council ("Council Amicus Br.") in support of the government makes a similar contention:

> *Boyle* would not have furnished a conclusive defense against the veterans' Agent Orange claims; and a jury would have probably found against petitioners on that defense and causation, notwithstanding judicial statements to the contrary.

See Council Amicus Br. at 18.

In sum, the court of appeals clearly erred in holding that petitioners' settlement of the Agent Orange litigation constituted a voluntary gift to the Vienam veterans and this Court could reverse the decision below on this basis alone. Because the government is unable to stand behind the court of appeals' reasoning on this point, it now seeks to justify that decision by asserting a variety of other arguments. Those arguments, however, were not the subject of the court of appeals' ruling and, in any event, as demonstrated below, do not withstand analysis.

B. The Government's Legal Arguments for Limiting *Spearin* Are Inconsistent With the Basic Theory of This Court's Decisions and Fundamental Principles of Contract Law

The government concedes petitioners' principal position that a *Spearin* claim provides a remedy to contractors who suffer damages as a result of producing products in accordance with government specifications. "The proposition that the government will bear the cost of . . . difficulculties attributable to errors or latent flaws in its own specifications, and not caused by any fault on the part of the contractor, is a reasonable estimate of the parties' original mutual intentions." (Gov. Br. at 17). According to the government: "[I]f the product's design was, in fact, defective, any losses would properly be the government's responsibility." (Gov. Br. at 22). Otherwise, "the result could be substantive unfairness to the contractor." (*Id.*)

Given these concessions, and the government's earlier admission that it designed the specifications for Agent Orange, petitioners at a minimum have stated a *prima facie* claim under *Spearin* for recovery of their damages as a result of the Agent Orange litigation. Nevertheless, the government now contends (1) that petitioners' *Spearin* claim involves non-recoverable post-performance damages, which allegedly are outside the scope of the *Spearin* warranty (Gov. Br. at 15-17); and (2) that there was insufficient evidence linking the exposure to Agent Orange to the injuries allegedly suffered by the plaintiffs in the Agent Orange litigation and, therefore,

petitioners cannot demonstrate that the warranty was breached. (Gov. Br. at 31-33). Both arguments are predicated on a fundamental misunderstanding of the requirements established by this Court in *Spearin* and general contract law principles.

1. At common law, no particular type or category of damages is excluded from recovery in an action for breach of contract. In particular, where third-party litigation, settlement or liability costs, including attorneys fees, are reasonably foreseeable to the breaching party at the time of contracting, then they are properly recoverable as contract damages:

> The party in breach is liable for the amount of any judgment against the injured party together with his reasonable expenditures in the litigation, if the party in breach had reason to foresee such expenditures as the probable result of his breach at the time he made the contract . . . . In furtherance of the policy favoring private settlement of disputes, the injured party is also allowed to recover the reasonable amount of any settlement made to avoid litigation, together with the costs of settlement.

Restatement (Second) of Contracts § 351 at comment c.

Under this principle, all foreseeable damages should be recoverable under *Spearin*, regardless of when the damages were incurred or the type of underlying action that gave rise to the damages. Of course, foreseeability cannot be decided on summary judgment, particularly absent a developed factual record. *E.g.*, *Diaz Irizarry v. Ennia, N.V.*, 678 F. Supp. 957, 959 (D.P.R. 1988).

Spearin itself makes clear that the damages for breach of a *Spearin*-type warranty are not limited to costs of performance, and instead include "all losses" reasonable foreseeable. *Spearin*, 248 U.S. at 62. Thus, the Court in *Spearin* permitted recovery of post-performance damages in the form of lost profits, which clearly are post-performance damages.

Spearin's progeny likewise have placed no artificial temporal limits on the damages that may be recovered in a breach of warranty case. Even the government con-

cedes that the Claims Court allowed recovery for post-performance damages in *Poorvu v. United States*, 420 F.2d 993 (Ct. Cl. 1970). (Gov. Br. at 15-16). "It would make little sense to impose the obligation of an implied warranty [under *Spearin*] and then limit the life of the warranty to the period of construction." *Poorvu*, 420 F.2d at 1000. Under this reasoning, which even the courts below accepted (*see* Pet. App. 17a; 61a), petitioners have stated a claim for recovery that requires further proceedings on remand.

2. The government next argues that petitioners cannot prove that the government breached an implied warranty by providing defective specifications because supposedly "no court has ever found credible evidence that exposure to Agent Orange caused any of the injuries complained of by the individual tort plaintiffs." (Gov. Br. at 31-33). As a matter of law, the government's approach is incorrect. To prove breach of warranty under *Spearin*, petitioners need only prove that the government's specifications were defective in some respect and that the defect caused petitioners to suffer economic damages. (Pet. Br. at 18). Petitioners do not need to prove that the defect in the specifications actually caused the injuries alleged by the plaintiffs in the Agent Orange litigation.

The government's contention confuses the burden of a plaintiff in a contract action with the burden of a plaintiff in a tort action. In a product liability tort action, a plaintiff alleging injury must prove both a defective specification *and* causation between the defective specification and the alleged personal injury. *See* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts*, § 103 at 713 (5th ed. 1984). In contrast, a plaintiff in a contract action need only prove a link between a defect that causes a breach of contract and the actual economic damages suffered by the contractor.

There can be little doubt that there exists a triable issue of fact as whether the government's specifications were defective. Those specifications inevitably led to the production of dioxin as a byproduct of the manufacture of Agent Orange, as the government itself has conceded. U.S. Brief in Opp. Cert. at 3, *Hercules v. United States*,

Nos. 94-1557 and 94-1800 (June 1995) ("U.S. Br. in Opp.").[8] *See also* Peter H. Schuck, *Agent Orange on Trial*, (enlarged ed. 1987) at 23 (stating that dioxin "inevitably" accompanied manufacture of 2,4,5-T, a herbicide used in the production of Agent Orange).

Moreover, dioxin is a highly toxic substance that the government knew to be potentially harmful at certain levels when it compelled petitioners to produce Agent Orange. If it were not, the government would have had no reason to establish a disability fund for veterans suffering from certain diseases associated with dioxin exposure. *See* Brief for the National Veterans Legal Services Program as Amicus Curiae in Support of Petitioners, at 7-9.

Additional evidence of the government's recognition of dioxin-related hazards lies in the decision of the Environmental Protection Agency to compel Hercules to remove dioxin created by the manufacture of Agent Orange from the environment through an expensive remedial plan. *See United States v. Vertac Chem. Corp.*, 46 F.3d 803, 806 (8th Cir. 1995). In its brief in opposition to Hercules' petition for certiorari in that case, the government contradicted its position here and acknowledged that dioxin "is a highly toxic byproduct" that was produced during the manufacture of Agent Orange. *See* U.S. Brief in Opp. at 3-4.

Finally, the government simply is wrong that no court has ever found credible evidence that Agent Orange was capable of causing harm. For example, in the Agent Orange class action itself, Judge Weinstein held that, "Agent Orange contained small quantities of dioxin. . . . As to the poisonous nature of dioxin and its ability to

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[8] The government contends erroneously that Hercules subsequently found a way to "eliminate" dioxin as a byproduct. (Gov. Br. at 32). In fact, it is impossible to avoid producing dioxin as a byproduct of Agent Orange. Hercules merely found a way to extract then detectable levels of dioxin from the final product so that the Agent Orange that it supplied to the United States no longer contained measurable dioxin. Rather, measurable dioxin ended up in the manufacturing wastes that became the subject of the *Vertac* case.

cause harm to mammals, including homo sapiens, there is *no doubt.*" *In Re Agent Orange Prod. Liab. Litigation,* 597 F. Supp. 740, 777 (E.D.N.Y. 1984) (emphasis added). *See also In Re Agent Orange Prod. Liab. Litigation,* 611 F. Supp. 1267, 1268 (E.D.N.Y. 1985); Council Amicus Br. at 18-20.

Based on the findings made in the *Agent Orange* litigation, along with the substantial body of evidence suggesting that dioxin is highly toxic, petitioners have, at a minimum, raised a triable issue of fact as to whether the government's specifications for Agent Orange were defective in breach of the *Spearin* warranty.

Petitioners also are able to show that the defect in the specifications gave rise to their damages. This causative link is established because petitioners' decision to settle the Agent Orange class action was reasonable, and was based on evidence of potential liability to the underlying plaintiffs because of the defect in the government's specifications. As discussed in petitioners' opening brief, damages in a contract resulting from third-party claims do not require a defendant settling those third-party claims to prove actual liability in the underlying litigation. Rather, a showing of potential liability is sufficient, a point the government does not dispute. (Pet. Br. at 26-27). Even the government does not refute that petitioners were at least potentially liable to the plaintiffs in the Agent Orange class action, as the court in that action so found in approving the settlement entered into by petitioners. *In Re Agent Orange Prod. Liab. Litigation,* 597 F. Supp. at 777 ("there was a possibility of ultimate liability with claims totalling billions of dollars.").[4]

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[4] Because petitioners are able to meet the elements of *Spearin,* and because the government basically concedes that there is no "practical difference" between *Spearin* and the superior knowledge theory, petitioners are able to meet the elements of a superior knowledge claim as well. *See Helene Curtis v. United States, supra.*

Petitioners have not waived a superior knowledge claim by not presenting it in the "Question Presented" section of their petition. A superior knowledge claim is fairly included within the broad question presented in petitioners' petition for certiorari. S. Ct. Rule 14.1(a).

C. Public Policy Would Be Disserved by Limiting *Spearin* Unfairly To Deprive Petitioners of Their Contractual Remedy for the Injuries Inflicted Upon Them by the United States

The government wrongly argues that it would offend public policy to permit petitioners to assert a *Spearin* claim. To the contrary, the public interest affirmatively supports petitioners' claim.

1. The government argues that, even if there were no legal or factual impediments to the assertion by petitioners of a *Spearin* claim, petitioners should not be permitted to assert such a breach of contract claim here because its assertion would vitiate the government's immunity from tort liability. (Gov. Br. at 18). Any such argument is foreclosed by this Court's previous decisions rejecting the contention of any relationship between government tort immunity and the proper scope of the remedies available for the government's breach of contract. In *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 465 (1980), this Court held, "The absence of Government tort liability has not been thought to bar contractual remedies on implied-in-fact contracts, even in those cases also having elements of a tort." Thus, even if the government is immune in tort from certain damages, that fact does not preclude liability in contract predicated on the same underlying circumstances.

In *Hatzlachh*, the United States Customs Service had seized goods of a merchandise importer for customs violations, imposed a penalty, and agreed to return the goods. When the goods were returned, however, substantial merchandise was missing. The importer sued in the Claims Court under the Tucker Act, 28 U.S.C. § 1491, for the value of the lost merchandise, alleging breach of an implied contract of bailment. The Claims Court found that the Federal Tort Claims Act barred a tort claim for the loss, and accordingly refused to recognize a contract claim. This Court reversed, holding that "neither the existence of a tort remedy nor the lack of one is relevant to determining whether there is an implied-in-fact contract of bailment upon which the United States is liable

in the Court of Claims pursuant to its waiver of sovereign immunity contained in the Tucker Act." *Id.* at 466.[6]

Hatzlachh forecloses any argument that liability for governmental breach of contract is restricted by reference to the policies underlying the government's immunity to tort claims brought by military personnel. Moreover, the argument advanced by the government on this point is singularly unpersuasive because the specific policies underlying the government's tort immunity are not sufficiently implicated by recognition of a *Spearin* claim in the circumstances of this case to justify the wholly unfair result proposed by the government. *See Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 672-73 (1977).

Recognition of a *Spearin* claim here would not implicate these rationales because a *Spearin* claim is based on federal common law under the Tucker Act, ensuring national uniformity. Second, neither the Tucker Act nor the FTCA purports to limit the government's liability for damages flowing from a breach of contract in the military context. *See Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983).

Finally, resolution of petitioners' *Spearin* claim does not implicate the concern expressed in *Stencel* regarding the adverse effects on military discipline if military personnel were permitted to use a tort action effectively to countermand the authority of their superiors. Such a concern simply is not operative where a suit is brought by the manufacturer for breach of warranty based upon a failure to apprise the manufacturer of known defects.

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[6] See also *Kiefer & Kiefer v. RFC*, 306 U.S. 381 (1989), where this Court held that a contract action was not barred even when the government was protected by tort immunity. In so doing, this Court stated:

> As to the states, legal irresponsibility was written into the Eleventh Amendment; as to the United States, it is derived by implication. . . . [B]ecause the doctrine gives the government a privileged position, it has been appropriately confined.

Id. at 388 (citations omitted).

Indeed, recognition of a *Spearin* claim in these circumstances should require no greater involvement in military decisionmaking than this Court has already sanctioned in *Boyle v. United Technologies Corp.*, 487 U.S. 500, with respect to the government contractor defense. In any event, any potential for after-the-fact analysis of military decisionmaking, standing alone, is not sufficient to warrant an extension of a judicially created doctrine that has been extensively criticized. *See United States v. Johnson*, 481 U.S. 681, 692-99 (1987) (Scalia, dissenting).

2. The government's suggestion that recognition of a *Spearin* claim here may violate the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1), also lacks merit. That Act does not bar recognition of valid contract claims. The court in *Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 716 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989), for example, rejected the lower court's finding that the Anti-Deficiency Act barred recovery under an implied contractual warranty:

> [A] *Spearin* warranty is, if breached, enforceable only in the courts. . . . [C]ourts are not required to investigate whether program funds are available. In the circumstances, we are reluctant to found our holding on the Anti-Deficiency Act, and to do so would severely hamper the enforcement of *Spearin*-type warranties in the courts.

Id.; see also Pet. Br. at 40-41. Any other reading of the Anti-Deficiency Act would render *Spearin* a nullity.

3. In urging the Court to impose the entire burden of the Agent Orange settlement on petitioners, the government seeks to elevate form over substance. The government contends that there is a conceptual relationship between the government contractor defense and a *Spearin* claim which requires the following syllogism: if the government contractor defense was not available, then a *Spearin* claim ought not to be available or, conversely, if a *Spearin* claim is properly stated here, then the gov-

ernment contractor defense should have prevailed earlier.[6] The government thus constructs a tidy, theoretical "heads it wins; tails petitioners lose" argument.

The flaw in this purely theoretical approach is that it ignores the realities of litigation. The question presented here is what happens when theory fails and the government's contractors suffer real financial loss through no fault of their own. The government's answer is to stick its head in the sand and insist that there should have been no loss. Petitioners' response is that they did in fact suffer such losses due to the unique circumstances of this case. If, as the government argues, the government contractor defense (and petitioners would argue the immunity under § 707 of the Defense Production Act as well) provides virtually complete protection to contractors who otherwise would have a *Spearin* claim, then the government's future exposure to its contractors would be virtually nil. Regardless, petitioners are before this Court now with a contract claim that did not fit the government's theory and the government has not proffered any arguments to justify turning a blind eye to petitioners' losses.

Nor is there any reason to expect that contractors will settle underlying actions and pay large amounts to tort plaintiffs with the intent to seek reimbursement later against the government instead of vigorously defending against the tort claims. Contractors would have no obligation to pay damages if they prevail on the government contractor defense. Also, it is far more difficult to assert a *Spearin* claim than to assert a government contractor defense, because it is necessary under *Spearin*, but not

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[6] The premise of the government's argument is flawed in any event because there is no inevitable linkage between the government contractor defense in *Boyle* and a *Spearin* claim. Thus, it is possible to lose a *Boyle* defense and still prevail under *Spearin*. For instance, the doctrines have different elements concerning the knowledge of the contractor about hazards associated with the product. In any event, the government's tidy theory is completely useless as applied in 1984.

under the government contractor defense, to prove that the specifications were defective, and that they caused the contractor to suffer damages. Finally, any contractor that expected to continue doing business with the government would be a most reluctant *Spearin* litigant.

4. Neither Hercules nor Thompson had manufactured defoliants prior to Agent Orange, and neither company was aware of the hazards of dioxin. In contrast, the record reveals that the government had extensive experience with defoliants and was aware both that its specifications for Agent Orange would lead to a product containing dioxin and that dioxin was dangerous to humans. The government should have shared its technical knowledge with petitioners, which might have given them a chance to remove this hazardous byproduct or at least to insist on appropriate warnings.

The government contractor defense does not prevent irresponsible government action because the availability of the defense directly affects only petitioners, not the government. As the government's conduct in this case demonstrates, it is of no consequence to the government whether petitioners prevail in their assertion of this defense .

A *Spearin* claim, however, affects the government directly. The possibility of being held liable for damages in contract gives the government an incentive to monitor more carefully its specifications. Moreover, the possibility that a *Spearin* claim may be brought by contractors who settle tort claims should give the government an incentive to support contractors who assert the government contractor defense to such tort claims, thereby rendering the underlying litigation more efficient.

Moreover, if this Court confirms that a *Spearin* claim is available to contractors who reasonably settle underlying tort claims, that outcome will both be equitable to contractors and consistent with the universal rule encouraging settlements. (Pet. Br. at 22). The court of appeals' position that petitioners are not entitled to recovery because they settled voluntarily wrongly functions

as a penalty for settlement and thereby promotes senseless and expensive litigation.[7]

II. THE GOVERNMENT MISCHARACTERIZES PETITIONERS' DPA ARGUMENT, AND CONVENIENTLY IGNORES CRUCIAL PROVISIONS IN THE DPA

The government depicts petitioners as pressing the Court to hold that the Defense Production Act, 50 U.S.C. § 2071(a) *et seq.*, obliges the United States to be responsible for the "character of the goods to be provided under the DPA contract." (Gov. Br. at 36). Similarly, the government contends that petitioners maintain that the protections of the DPA "extend to *any* legal liability that a contractor might otherwise incur 'by virtue of [its] performance of [a DPA] contract." (Gov. Br. at 36). These characterizations distort petitioners' arguments.

A. Petitioners' position is merely that a promise to indemnify may be factually implied from the nature of, and the totality of the circumstances surrounding, the parties' contractual arrangement.[8] *See, e.g., Weyerhauser Steamship Co. v. Nacirema Operating Company*, 355 U.S. 563, 565 (1958). Here, an implied-in-fact indemnification agreement arose out of the circumstances that surrounded the coerced contractual arrangement that led to petitioners' production of Agent Orange.[9] These circumstances include the fact that these contracts were executed pursuant to the authority of the DPA. Accord-

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[7] If, instead of settling, petitioners had pursued the government contractor defense to a "successful" conclusion in the Agent Orange litigation, petitioners still would have a claim against the government under *Spearin* for the damages attributable to that litigation, *i.e.*, the costs, including attorneys fees, petitioners incurred in defending that litigation. Those costs easily could have exceeded the amount petitioners chose to pay in settlement.

[8] Petitioners are not suggesting that they posses a private right of action under the DPA pursuant to *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny.

[9] The government incorrectly argues that Hercules did not advance this claim either in the Claims Court or in the court of appeals; Hercules' complaint contains DPA allegations. (J.A. 9-10).

ingly, petitioners contracted to produce Agent Orange against the specific backdrop of § 707(a) of the DPA which establishes the Congressional intent that manufacturers be held harmless for any liabilities flowing from compliance with an order for production issued under the Act. (Pet. Br. at 40-41).

The reasonable expectations of the parties to a contract may derive in part from the statutes relevant to the contractual obligations undertaken. *See Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1867); 3 *Corbin on Contracts* § 551, p. 198 (1960) ("[i]t is always true that words and other symbols must be interpreted in the light of the surrounding circumstances; and the existing statutes and rules of law are always among these circumstances"). Thus, the existence of the DPA's hold harmless provision shows that an implied-in-fact agreement existed between petitioners and the government. In particular, if petitioners did suffer significant losses flowing from compliance with an order under the Act, both parties understood that the government would indemnify them.

Government compulsion is not the only reason to imply an agreement. Here, petitioners produced Agent Orange in compliance with government specifications. The government, but not petitioners, knew that these specifications inevitably would result in a product containing dioxin. The government, but not petitioners, knew that dioxin was highly toxic at certain levels. Finally, the government, but not petitioners, knew of the manner in which Agent Orange would be used in Vietnam and the extent to which service personnel would be exposed to that substance.

Taken together, particularly in the context of compelled production under the DPA, these circumstances fully warrant finding an implied agreement to indemnify. The courts repeatedly have found an implied duty to indemnify where the indemnitee has incurred tort liability to a third party injured by a dangerous condition caused by the indemnitor and where the indemnitee was free of fault. *See Weyerhauser*, 355 U.S. at 565 (obligation to

provide stevedoring services on shipowners' premises included an implied obligation "to perform with reasonable safety and to discharge foreseeable damages resulting to the shipowner from the [stevedore's] improper performance"); *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 133-134 (1956). *See also Hamilton v. Volkswagen of America*, 484 A.2d 1116, 1118 (N.H. 984) (Souter, J.); *Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1219 (9th Cir. 1974).[10]

The government attempts to distinguish this Court's holding in *Ryan Stevedoring* by styling itself as petitioners' "customer," rather than "supplier." (Gov. Br. at 41). This distinction is irrelevant. The responsibility for the production of the defective product lies with the government, whose activist role in compelling the manufacture of Agent Orange pursuant to its detailed specifications is ill-described by the phrase "customer."

The government's efforts to distinguish *Michigan Wisconsin Pipeline Co. v. Williams-McWilliams Co.*, 551 F.2d 945 (5th Cir. 1977), which the Government admits is "relevant to the issues in this case," is unavailing. It is not distinguishable on grounds that it involved an "affirmative misrepresentation." (Gov. Br. at 42). In fact, *Michigan Wisconsin* involved specifications which simply overlooked the addition of a more recent pipeline. The failure to document the pipe was an inadvertent oversight. Nevertheless, the omission created an implied indemnity. 551 F.2d at 948.

The government also seeks to avoid its reasonable obligations under the contracts it imposed upon petitioners by its self-serving and unsubstantiated representation that it did not intend to indemnify petitioners for the risks it

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[10] The power of the Court to read an indemnification provision into the contract is not "implied-at-law," as suggested by the government. (Gov. Br. at 40, n.23). Indemnities which are implied by the circumstances, i.e., implied-in-fact, include those recognized in *Spearin*, *Helene Curtis*, *Weyerhauser*, *Ryan* and similar cases. Even the government recognizes in these instances that a court which recognizes an implied contract term does not make the implied term one implied-at-law. (Gov. Br. at 15).

imposed. (Gov. Br. at 39). The government's subjective intent, however, is irrelevant. Indeed, the government's own analysis of *Spearin* proves as much: "if the government knew more than the contractor about the part of the specifications that proves to have been inaccurate, then a court may properly infer an agreement between the parties that the government would bear any resulting increase in the cost of performance." (Gov. Br. at 15). Such an inference is not dependent on subjective intent.

B. The government concedes that the protections conferred by § 707 of the DPA are co-extensive with the risks imposed by the Act. (Gov. Br. at 35). Nevertheless, the government argues that such protection is limited to cases in which the government requires a manufacturer to give priority to a government contract. This argument is based upon the government's failure to quote the entire statute.

The government attempts to support the limitation of the DPA's implied protections to priority through a sleight of italics, by selectively highlighting language in the Act that establishes the President's authority to est blish "priority," and ignoring completely the Act's language that also empowers the President "to allocate materials and facilities." (Gov. Br. at 34). Focusing on the "priority" language, however, does not change the fact that the actual authority the government exercised against petitioners was to "require acceptance and performance," language that the government notably failed to highlight. 50 U.S.C. § 2071(a). The record makes clear that the DPA was used to compel acceptance and performance of contracts which otherwise would have been rejected outright, not merely delayed. (*See e.g.*, Pet. App. 4a).

C. The government is simply incorrect that acceptance of petitioners' claim would mean that "the costs of any lawsuit brought against a contractor providing a product pursuant to the DPA would be passed through to the United States through indemnification, regardless of the culpability of the contractor." (Gov. Br. at 41). The facts presented by petitioners in this case in support of

an implied indemnification obligation are unique, both as to the level of government cupability in mandating a product pursuant to specifications it knew to be defective and as to the complete innocence of the contractors and their inability to take any steps to defend their interests.

The government also is incorrect that § 707 should not extend to tort liabilities because such liabilities already are taken into account by the government contract defense. (Gov. Br. at 36). Neither this Court in *Boyle*, nor lower courts which weighed the existence and contours of the government contractor defense prior to *Boyle*, even discuss the DPA. Conversely, Congress did not discuss the government contractor defense when it enacted the DPA. Thus, the existence of the government contractor defense should not diminish the protections that § 707 of the DPA provides here.

The petition in this case began with an observation by Judge Plager in his dissent concerning the core equities of petitioners' position. It is fitting to end the reply brief on the merits by returning to Judge Plager. He observed that in this case more than many others "[u]ndue attention to trees . . . hides the forest." (Pet. App. 34a). Thus, while petitioners are confident that a fair application of *Spearin*, *Helene Curtis*, and the DPA provides persuasive independent bases for holding that this case should go forward, what makes this case compelling is that the various factors that undergird those doctrines all coalesce here. Petitioners were compelled under the DPA to produce a potentially harmful product in a time of national emergency, even though the government had superior knowledge about the risks and deliberately chose not to share its knowledge with petitioners. Petitioners urge the Court to hold that "the law affords substantially more justice than the majority" below allowed (*id.*) and to permit petitioners an opportunity to discover and prove the federal government's liability on their contract claims.

CONCLUSION

The judgment of the court of appeals should be reversed, and the matter remanded.

Respectfully submitted,

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No. 94-818

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HERCULES, INCORPORATED,

and

WM. T. THOMPSON COMPANY
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus curiae will address only the following question:

Whether credible scientific evidence now exists supporting an association between exposure to dioxin (which was contained in Agent Orange sprayed in Vietnam) and various cancers and other diseases suffered by Vietnam veterans.

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On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of this Court.

INTEREST OF *AMICUS CURIAE*

The National Veterans Legal Services Program ("NVLSP") is a non-profit, tax-exempt organization that serves as a national support center in the area of veterans law, including disability compensation cases. The NVLSP regularly represents veterans before the United States Court of Veterans Appeals and in various other federal courts. The NVLSP also publishes informational materials

for veterans and their advocates and conducts training events for veterans advocates. The services of the NVLSP are provided to individual veterans and classes thereof, national veterans service organizations, state and county veterans offices, community-based veterans organizations, volunteer attorneys, private bar attorneys, legal services attorneys, and other veterans advocates nationwide. The NVLSP has assisted and continues to assist Vietnam veterans in obtaining compensation through administrative and judicial means for health problems resulting from exposure to Agent Orange.

INTRODUCTION AND SUMMARY OF ARGUMENT

From 1962 to 1971, millions of gallons of defoliant, including principally "Agent Orange,"[1] were sprayed over Vietnam in support of military operations. Produced in accordance with government specifications, Agent Orange contained dioxin, one of the most toxic substances known to science. Since the war, many American veterans who were exposed to Agent Orange while serving their country have suffered, and continue to suffer, from an array of physical illnesses, diseases, and death.

In its Brief For the United States in Opposition, the government argued that one ground for upholding the Federal Circuit's decision is that there is no credible evidence to support the claim that Agent Orange caused any health problems in veterans exposed to it (Resp't Br. in Opp'n to Cert. 11, 14-15) ("Resp't Br."). Absent evidence supporting causation, the United States asserts, petitioners would not have been liable to the veteran class members had the case gone to trial. *Id.* at 11, 14-

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[1] Agent Orange is a 50/50 blend of 2,4-Dichlorophenoxyacetic Acid (2,4-D) and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T). The chemical processes of making 2,4,5-T necessarily create some amount of 2,3,7,8-Tetrachlorodibenzo-*p*-dioxin ("dioxin").

15. Therefore, petitioners' costs of settling the class action were not caused by any alleged dangers of Agent Orange, but rather by petitioners' voluntary decision to settle the class action. *Id.* at 7-8.

The NVLSP objects to the United States' suggestion that there is no credible evidence that Agent Orange caused any health problems to Vietnam veterans. The government ignores substantial, credible scientific and medical evidence that supports an association between dioxin exposure and certain cancers and other serious diseases suffered by many Vietnam veterans. After reviewing a vast amount of this evidence, the National Academy of Sciences (NAS) so found. Even the Secretary of Veterans Affairs, who commissioned the NAS's exhaustive review, has concluded that the credible scientific evidence in favor of an association between exposure to dioxin and certain diseases is equal to or outweighs the credible evidence against such an association.

ARGUMENT

I. CREDIBLE SCIENTIFIC EVIDENCE SUPPORTS FINDING AN ASSOCIATION BETWEEN EXPOSURE TO DIOXIN (WHICH WAS CONTAINED IN AGENT ORANGE SPRAYED IN VIETNAM) AND VARIOUS CANCERS AND OTHER DISEASES SUFFERED BY VIETNAM VETERANS.

The government argued in its Brief For the United States in Opposition that one ground for upholding the Federal Circuit's decision in favor of the government is that there is no credible evidence to support the claim that Agent Orange caused any health problems in veterans exposed to it (Resp't Br. 11, 14-15). The government relies in part on this purported absence of causation evidence to support its argument that petitioners would not have been liable to the veteran class members had the case gone to trial and, therefore, the petitioners' costs of settling the Agent Orange Litigation [2] were not caused by the gov-

ernment but rather by the petitioners' voluntary decision to settle. According to the government, petitioners' chances of facing actual liability in the Agent Orange Litigation were so remote as to "necessarily imply[] that petitioners' settlement could not have been 'reasonable.'" (Resp't Br. 20).

The United States' assertion of an "absence of scientific evidence regarding the consequences of dioxin exposure" (Resp't Br. 11) flies in the face of the now available scientific evidence, the conclusions of the National Academy of Sciences (NAS), and the findings of the Secretary of Veterans Affairs. Credible scientific evidence supports finding that it is more likely than not that dioxin causes various diseases in human beings. Numerous Vietnam veterans suffer from these diseases.

Between 1962 and 1971, the United States military sprayed approximately 11.2 million gallons of Agent Orange over approximately 3.6 million acres in Vietnam. These large-scale spraying operations spread herbicides to defoliate potential ambush areas and to destroy the enemy's crops. From the first reports of the use of the chemicals in 1964, groups of scientists, including the American Association for the Advancement of Science, banded together to oppose the use of the chemicals. See Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, Institute of Medicine, National Academy of Sciences, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* 29 (1994) ("NAS Report"). In 1969, the first scientific report found that one of the primary chemicals in Agent Orange caused birth defects in laboratory animals. See *id.* at 30 (citing Bionetics Research Laboratories, *Evalu-*

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[2] *Agent Orange Litigation* refers to the class action brought by Vietnam veterans against the United States and various herbicide manufacturers including the petitioners. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

ation of Carcinogenic, Teratogenic and Mutagenic Activities of Selected Pesticides and Industrial Chemicals (1968)). In response, the United States Army suspended use of Agent Orange in 1970 and all herbicide spraying operations in 1971.

After years of struggle within the scientific community and in the Agent Orange Litigation, Congress recognized a need for an objective scientific appraisal of the association between the increased risk of disease and exposure to Agent Orange and the other herbicides used in support of military operations in Vietnam. Accordingly, Congress required the Secretary of Veterans Affairs to agree to a review of the issue by the NAS. See Agent Orange Act of 1991, Pub. L. No. 102-4, § 3, 105 Stat. 11, 13-15 (codified as amended at 38 U.S.C. § 1116 (1991)). The NAS committee was charged with evaluating the strength of the scientific evidence as to an association between human exposure to the herbicides and suspect diseases.

Created by an Act of Congress, the NAS is a non-governmental, non-profit society of distinguished scholars with a mandate to advise the federal government on pressing scientific and technical issues. Its members are elected by their peers from universities and the private sector, and the members serve without compensation. For its Agent Orange committee, the NAS gathered a group of eminent professionals, all of whom had no conflicts of interest, and none of whom had taken public positions on the potential health effects of herbicides. See NAS Report at vii, 764-70.

In preparation for its report, the NAS committee conducted an exhaustive review of the available evidence—reading 6,420 abstracts, performing detailed review and analysis of 230 epidemiological studies, holding three formal public hearings, and consulting with outside experts. See NAS Report at xi-xiii, 735-56. In assessing the relative validity of studies, the NAS critiqued the

methods of its peers and based its conclusion that there was a "positive association" between herbicide exposure and five specific diseases only on studies that eliminated chance, bias, and confounding with reasonable confidence. *Cf. Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2795-99 (1993) (proposing similar criteria). In this process, the committee considered several factors for each possible association including its statistical strength, dose-response relation, temporal relation between exposure and onset, consistency across studies, specificity, and biologic plausibility.[3] See NAS Report at 238-40. While there is much more credible evidence favoring an association between dioxin exposure and illness as to some diseases than to others, the NAS Report demonstrates, at a minimum, the existence of a material issue of fact with respect to a number of diseases.

Based on this extensive review, the NAS committee concluded that "sufficient evidence" exists to find a "positive association" between exposure to Agent Orange and the onset of three cancers: soft tissue sarcoma,[4] non-Hodgkin's lymphoma,[5] and Hodgkin's disease.[6] See *id.* at 6-10, 475-501, 525-64, 572-74. The committee also found "sufficient evidence" of a "positive association" between

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[3] Animal studies demonstrate the plausible biological mechanism of dioxin's actions. These studies establish that dioxin "interacts with an intracellular protein called the Ah receptor [and that] this interaction appears to play a role in a number of health effects observed in animals. Because humans also have intracellular proteins identified as Ah receptors, [the] interactions [of dioxin] and [the Ah] receptors could play a role in human health effects." NAS Report at 3.

[4] A diverse group of malignant neoplasms (tumors) in the areas within and between organs. See *id.* at 782.

[5] A diverse group of malignant lymphomas, that is, tumors derived from cells in the lymph nodes, without the giant Reed-Sternberg cells characteristic of Hodgkin's disease. See *id.* at 781.

[6] A malignant lymphoma characterized by progressive enlargement of the lymph nodes, liver, and spleen, and by progressive anemia. See *id.* at 780.

Agent Orange and two severe skin conditions: chloracne [7] and porphyria cutanea tarda (PCT).[8] See *id.* at 6-10, 672-83. Moreover, the committee found evidence "suggestive" [9] of an association between the herbicides used in Vietnam and respiratory cancers (lung, larynx, and trachea), prostate cancer, and multiple myeloma.[10] See *id.* at 6-10, 460-75, 512-22, 574-76.

The NAS's conclusions following its exhaustive review and analysis of the scientific evidence concerning the toxicity of Agent Orange illustrate the genuine dispute that exists as to the causal relationship between exposure to Agent Orange and veterans' health problems. After the NAS Report, the Department of Veterans Affairs (VA), which had resisted acknowledging the dangers of Agent Orange, reviewed the NAS Report and "all other sound medical and scientific information." 38 U.S.C. § 1116(b)(2) (1991). The VA concluded that the credible evidence in favor of an association between herbicide exposure and disease is at least as strong as the credible evidence against such an association as to all five diseases for which the NAS has found "sufficient evidence," and four of the five diseases for which the NAS has found "suggestive evidence." In making this determination, the Secretary of Veterans Affairs was required to consider

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[7] An acne-like eruption, evident shortly after exposure, which produces persistent comedones, keratin cysts, and inflamed papules causing hyperpigmentation and lesions often resulting in a characteristic scarring pattern. See *id.* at 779.

[8] An uncommon disorder of porphyrin metabolism manifested in thinning and blistering of skin in sun-exposed areas in addition to excess skin pigmentation and excessive hair growth. The committee limited its finding to genetically susceptible persons. See *id.* at 781.

[9] For this latter category of cancers, the committee could not confidently eliminate possible chance, bias, or confounding. See *id.* at 6, 674-75.

[10] Cancer of specific bone marrow cells characterized by tumors in the marrow of various bones; more specifically, a malignant proliferation of plasma cells derived from B lymphocytes. See *id.* at 781.

whether the results were "statistically significant, . . . capable of replication, and [could] withstand peer review." 38 U.S.C. § 1116(b)(2) (1991).

In 1991, the VA concluded that a positive association exists between exposure to Agent Orange and the subsequent development of soft tissue sarcoma and reaffirmed its earlier determination of such an association with chloracne. See 56 Fed. Reg. 51,651 (1991) (sarcoma); 56 Fed. Reg. 52,473 (1991) (chloracne). Although the VA had initially denied an association between herbicide exposure and PCT, after the NAS study, the VA found credible evidence of such a linkage. Compare 56 Fed. Reg. 52,473-74 (1991) (denying association with PCT) with 58 Fed. Reg. 50,528-29 (1993) (finding credible evidence of such an association). Similarly, the VA has found associations with non-Hodgkin's lymphoma and Hodgkin's disease, as well as with respiratory (lung, larynx, and trachea) cancers and multiple myeloma. See 59 Fed. Reg. 5,161-62 (1994) (proposed rule) (codified at 38 C.F.R. § 3.309 (1994)). The NAS Report has thus altered the "one principle firmly embedded in [the VA's] bureaucratic mind" that "any problems suffered by veterans exposed to Agent Orange . . . were not, with the exception of chloracne, caused by the herbicide." Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 24 (1986).

Moreover, the VA has not merely made formalistic findings of a positive association between dioxin exposure and those diseases but, pursuant to the Agent Orange Act of 1991, has granted presumptive service connection to Vietnam veterans for these diseases. As a practical matter, this means that Vietnam veterans suffering from any of those diseases are presumptively entitled to VA disability compensation, or their families to VA death benefits if the veteran died from these diseases. The number of veterans receiving such compensation has dramatically increased in the last two years as a result of the newly added diseases, so that according to the VA Compensation and

Pension Service, as of February 1, 1995, approximately 2,300 veterans receive VA compensation for Agent Orange related diseases.[11] In addition, the number of latent cases is, of course, unknown—it took almost 40 years for solid tissue cancers to develop in atomic bomb victims in Japan. See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 795 (E.D.N.Y. 1984).

CONCLUSION

Contrary to the government's suggestion, substantial, credible scientific evidence now exists which supports an association between exposure to dioxin and certain cancers and other diseases. The evidence has indeed been sufficient to compel the Secretary of Veterans Affairs to grant presumptive service connection and corresponding VA benefits to Vietnam veterans solely on that basis, pursuant to the Agent Orange Act of 1991.

Respectfully submitted,

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[11] Information provided by facsimile to Gershon M. Ratner by Steven Thornberry, VA Compensation and Pension Service, Feb. 6, 1995.

(8)

No. 94-818

In the Supreme Court of the United States

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HERCULES INCORPORATED

and

WM. T. THOMPSON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the government must ultimately bear responsibility for damages resulting from government-mandated production of Agent Orange by private companies pursuant to governmentally-imposed Defense Production Act contracts.

2. Whether the Federal Circuit's limited view of the indemnification provided by Section 707 of the Defense Production Act is fundamentally inconsistent with (1) the government contractor defense created by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); (2) the affirmative protections for damages caused by defective government contract specifications, as stated in *United States v. Spearin*, 248 U.S. 132 (1918); and (3) the law's general protection of subordinate contracting parties.

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IN THE

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest association of businesses, companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 220,000 companies, trade and professional associations, and state and local Chambers of Commerce. It is the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court. The

Chamber seeks to advance those interests by filing briefs in cases of importance to the business community. Among the Chamber's constituencies is a core of businesses which contract with the United States.

The decision of the United States Court of Appeals for the Federal Circuit below has serious adverse implications for large and small corporations alike, because it would allow the government to avoid the consequences of its actions when it mandates production of potentially hazardous materials and products in support of the national defense and other government-sponsored objectives. The Federal Circuit's view of governmental responsibility for government actions, if upheld, would thrust upon private parties liability for doing the government's will. The Chamber believes it is important for this Court to recognize the significance of this issue to the business community.

Permitting tort liability which is the direct and proximate result of government requirements ultimately to be imposed on government contractors raises serious legal and constitutional concerns, since this liability is neither bargained for nor avoidable. In the Chamber's view, such liability is wholly inconsistent with the overarching legal principle that control over a contract equals responsibility for its consequences. It is also inconsistent with existing doctrines protecting government contractors from contractual and third-party tort liability for actions dictated by the government through mandatory contracts, and specifically inconsistent with the expressed will of Congress embodied in Section 707 of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061-2171 (1988 & Supp. V 1993) (the "DPA"). The Federal Circuit's crabbed reading of contract law and the government contractor defense is inconsistent with applicable decisions of this Court, and should therefore be reversed.[1]

---

[1] The petitioners and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

STATEMENT OF THE CASE

The facts in this action are set forth in greater detail in petitioners' brief and in the record below. However, several facts are important to understand the nature of the Chamber's concerns regarding the Federal Circuit's view of the government contractor defense and the DPA.

During the Vietnam War, the government ordered the petitioners to produce Agent Orange. While the petitioners had produced herbicides, they had not produced defoliants and were not fully informed of the potential dangers of Agent Orange, which they produced according to governmental fiat and government specifications. The government did not disclose the risks of Agent Orange to the petitioners.

In the late 1970s, petitioners (and other Agent Orange manufacturers) were sued by a class of Vietnam veterans. The class plaintiffs sought damages for health problems allegedly caused by exposure to Agent Orange.

After several years of discovery, the petitioners moved for summary judgment, arguing that the government contractor defense (which was later accepted by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)) precluded the class tort claims. Though the motion was initially granted by the original district court judge assigned to the case, Judge Pratt, that motion was withdrawn by Judge Weinstein, Judge Pratt's replacement on the district court, so that the issue could be determined at trial. *In Re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 424 U.S. 1004 (1988).

Faced with what the district court later termed "a possibility of an ultimate finding of liability with claims totalling billions of dollars," *In Re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 749 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), the petitioners (and other Agent

Orange manufacturers) settled the class action at a cost to them of approximately $22 million (of a total settlement of $180 million).

Petitioners sought recovery of the settlement amount from the government in the Claims Court under the doctrine of *United States v. Spearin*, 248 U.S. 132 (1918), alleging unsuccessfully that the government had breached its warranty of specifications by ordering the manufacture of Agent Orange. The Claims Court also rejected petitioners' argument that they were entitled to relief under Section 707 of the DPA, which protects government contractors from liability for "damages . . . for any act or failure to act" resulting from DPA compliance. 50 U.S.C. app. § 2157 (1988).

The Federal Circuit, over the vigorous dissent of Judge Plager, affirmed the dismissal of petitioners' *Spearin* claims, holding that the government contractor defense would have provided petitioners an absolute defense to liability, and that therefore no damages were "caused" by the government. *Hercules, Inc. v. United States*, 24 F.3d 188, 200 (Fed. Cir. 1994).

The Federal Circuit also denied recovery under the DPA, holding that relief available under the DPA is limited to costs caused by giving priority to DPA contracts over private contracts. *Id.* at 202-04.

In dissent, Judge Plager argued that no one could have determined what the outcome of the application of the government contractor defense would have been. *Id.* at 207. Likewise, he attacked the majority's interpretation of the DPA as a "*non sequitur*" that ignored the language of the statute. *Id.* at 209-10.

The Court granted the petition for a writ of certiorari on April 3, 1995.

SUMMARY OF ARGUMENT

1. The history of the DPA demonstrates that Congress, recognizing the government's responsibility for the consequences of producing material for defense of the nation, intended to indemnify contractors. Section 707 of the DPA indemnifies the petitioners for the consequences of contracts entered into pursuant to the DPA, including damages in tort.

2. The Federal Circuit's misapplication of Section 707 is wholly inconsistent with existing protections for government contractors. The government contractor defense enunciated by this Court in *Boyle* shields government contractors from third-party tort liability for work performed pursuant to government contract specifications. The *Spearin* doctrine, which protects government contractors from the effects of faulty or harmful government contract specifications, provides a separate basis for the protection of government contractors performing the government's will. The Federal Circuit's analysis of Section 707 clashes with the reasoning of these important legal doctrines.

3. A review of closely-related, analogous settings within the law illustrates a fundamental principle: when a dominant party controls the terms, conditions, and method of performance in a contract of adhesion, it assumes responsibility for such control. In the law of adhesion contracts, control over a contract carries greater imposition of responsibility for its consequences. In the developing law of environmental liability, overweening government control over activities causing pollution also creates governmental liability.

4. The government compelled petitioners to produce Agent Orange and had exclusive power over all aspects of the contracts. As a matter of policy and economics, the government should not be allowed to escape its duty to indemnify the contractors.

ARGUMENT

This case concerns whether and to what extent the federal government may avoid liability for contracts which it has imposed upon private entities. Affirming the decision below would allow the government to escape the consequences of compelling petitioners to produce Agent Orange, which the government knew was potentially hazardous, dictating its content and labeling, and knowingly exposing service personnel to that substance.

Concomitantly, this case concerns the protections afforded to government contractors performing important and sometimes hazardous public policy goals. The protections afforded to government contractors are broader than the limited and internally inconsistent view of government contract indemnity adopted by the Federal Circuit.

While it is well-settled after this Court's determination in *Spearin* that the government warrants specifications it imposes in contracts, the Federal Circuit found that *Spearin* did not extend to indemnify the petitioners (which manufactured Agent Orange to government specifications) for the tort claims against them. Likewise, the court of appeals found that DPA Section 707 does not protect a contractor from tort liability caused by use of dangerous government specifications. The Federal Circuit then compounded its error by asserting that petitioners "voluntarily" failed to invoke the government contractor defense. None of these holdings survives scrutiny.

In sum, this case involves the misapplication of three doctrines that should work integrally to shield from liability government contractors doing the government's bidding: *Boyle*, which shields government contractors from third-party tort claims thorough a "shared immunity" with the government; *Spearin*, which provides an affirmative remedy to protect contractors from defective government specifications; and Section 707 of the DPA, which mandates that a contractor shall not be liable for "damages . . . for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or

order issued pursuant to this Act." These protections all have application in a setting in which the government maintains near-complete control over a contract of adhesion. Consistent with general contract principles, and legal principles in analogous cases involving the government, these protections place responsibility on the controlling party—the government.

The Federal Circuit failed to address the integral nature of these defenses, and held that the DPA provides no protection to the petitioners. As a result, government contractors are left defenseless when the government effectively seizes control of a private entity, then disclaims responsibility for the consequences of its seizure.

I. THE DEFENSE PRODUCTION ACT INDEMNIFIES THE PETITIONERS

As a concomitant of the broad powers it gives the government, the DPA provides contractors express protection from the consequences of compelled government contracts. This is clear from the history of the DPA and the language of the Act itself. Nevertheless, the Federal Circuit claimed to harmonize DPA Sections 101 and 707 when it stated that Section 707 provides no basis for indemnifying contractors for tort liability. The court of appeals cited no direct authority for this view, which conflicts with the text and the history of the DPA. To the contrary, the history of the DPA itself, as well as its interrelationship with the law concerning the government contractor defense and the contract protection against defective specifications, provide persuasive authority that the government must be responsible for the consequences of its compelled contracts.

A. History of the Defense Production Act

1. *Historical Development*

Grants of immunity and indemnity against third-party liability by the United States to its contractors are permitted by the authority conferred in the Constitution to

enter into contracts[2] and to exercise "War Powers."[3] When these two powers have fused, those who contract with the government for defense-related goods are protected from the consequences of the government's exercise of its political responsibilities,[4] particularly when the government has compelled the production.

Since before the First World War, Congress found it necessary to authorize the executive branch to compel production of goods. Congress recognized that contractors must be immunized or indemnified from liabilty which might grow out of less-than-voluntary contract performance.[5] Indeed, Congress has on other occasions also recognized the need to indemnify contractors facing performance risks. *See, e.g.*, 10 U.S.C. § 2354 (1994) (providing indemnification for contracts involving hazardous activities).

During the World War I era, Congress granted extraordinary powers to the executive branch to facilitate military mobilization. The National Defense Act of 1916 empowered the President in time of war or imminent war to place orders for products and materials required by the Army.[6] A similar act supported Navy procurement.[7] Compliance with these Acts took precedence over any other contract, and it was plain that these laws were intended to transform the normal process of commercial contracting into compelled undertakings. Neither act directly protected contractors from third-party liability:

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[2] *Dugan v. United States*, 16 U.S. (3 Wheat.) 172 (1818).

[3] *Lichter v. United States*, 334 U.S. 742 (1948).

[4] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[5] Willard H. Pedrick & Nora G. Springfield, *War Measures and Contract Liability*, 20 Tex. L. Rev. 71 (1949); Louis M. Brown, *The Effect of Conscription of Industry on Contracts for the Sale of Goods*, 90 U. Pa. L. Rev. 533 (1942).

[6] National Defense Act of 1916, ch. 134, § 120, 39 Stat. 166, 213.

[7] Act of March 4, 1917, ch. 180, 39 Stat. 1168, 1192, *re-enacted by* Act of July 1, 1918, ch. 114, 40 Stat. 704, 719-20.

both required only that the United States pay just compensation for conscripted goods.[8]

2. *World War II*

The contracting powers granted to the President during World War I expired at the cessation of hostilities. Thus, in 1940, when the situation in Europe required that the United States again mobilize for war, the President's special procurement powers were limited.

The National Defense Act of 1940 empowered the President, for two years, to require that contractors give priority to Army and Navy contracts or orders,[9] and was later amended to give the executive authority to require contractors to give priority to orders for materials deemed vital to the national defense.[10] Congress also expressly immunized contractors from liability for breach of contract damages resulting from the performance of priority orders.[11] The Selective Training and Service Act of 1940[12] gave the President authority to order necessary supplies or equipment for the Army or Navy.[13]

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[8] Some courts recognized that compliance with a compulsory order under the National Defense Act of 1916 excused the breach of a commercial contract, reasoning that sovereign acts had frustrated performance of the commercial contract. *See Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 F. 177 (2d Cir.), *cert. denied*, 253 U.S. 498 (1920).

[9] National Defense Act of 1940, ch. 440, § 2, 54 Stat. 676, 676.

[10] Act of May 31, 1941, ch. 157, 55 Stat. 236.

[11] *Id.* The legislative history of this provision recognized that manufacturers sued for damages had limited defenses to defaulted contracts, and "g[a]ve clear statutory protection to all manufacturers who comply with priority orders." H.R. Rep. No. 460, 77th Cong., 1st Sess. 6 (1941).

[12] Selective Training and Service Act of 1940, ch. 720, § 9, 54 Stat. 885, 892.

[13] *Id.* The authority conferred on the President by the Selective Training and Service Act of 1940 is identical to that of the National Defense Act of 1916.

Following the attack on Pearl Harbor, Congress enacted the First and Second War Powers Acts. The First War Powers Act authorized the President, when necessary to "facilitate the prosecution of the war," to permit an agency "exercising functions in connection with the prosecution of the war effort . . . to enter into contracts . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts" and regardless of the availability of appropriations.[14] The War Department relied on this broad grant of authority to assist contractors suffering financial losses and to indemnify contractors against damages arising from execution of government contracts.

The Second War Powers Act [15] again expanded the executive's power over defense contractors by giving the President authority to require *acceptance* of priority contracts or orders.[16] A contractor refusing contracts or orders faced criminal sanctions.[17] The Act expressly immunized contractors from liability for breach of contract.[18] Thus, the Act recognized that when the government exercised such complete control over contractors, the government, not the contractors, was implicitly responsible for the consequences to third parties.

The Second War Powers Act and the Selective Training and Service Act expired after World War II.[19] Concerned about the country's ability to meet foreign and domestic obligations,[20] Congress enacted the Selective

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[14] First War Powers Act, 1941, ch. 593, § 201, 55 Stat. 838, 839.

[15] Second War Powers Act of 1942, ch. 199, § 301, 56 Stat. 176, 177.

[16] *Id.* at 178.

[17] *Id.* at 179.

[18] *See L.N. Jackson & Co. v. Royal Norwegian Gov't*, 177 F.2d 694, 701 (2d Cir. 1949), *cert. denied*, 339 U.S. 914 (1950).

[19] Second War Powers Act of 1942, *as amended by* ch. 590, 59 Stat. 658 (1945); Selective Training and Service Act of 1940, *as amended by Act* of June 29, 1946, ch. 522, 60 Stat. 341.

[20] S. Rep. No. 1268, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. Serv. 1989.

Service Act of 1948, which authorized the President to place orders for articles or materials required by the military forces or the Atomic Energy Commission.[21] A contractor receiving orders under the Act was required to give them priority or face possible seizure of its plant and criminal sanctions.[22]

B. The Korean War and the Defense Production Act of 1950

The invasion of South Korea in 1950 thrust the United States into a military crisis which continued under the penumbra of the Cold War until the fall of the Berlin Wall in 1989.[23] In response to the sudden onset of the Korean War, Congress passed the Defense Production Act of 1950, which was in part derived from the emergency statutes enacted during World War II.[24]

Congress's principal purpose in passing the DPA was to provide material to the military in as short a time as possible without total disruption of a free economy.[25] DPA Section 101, 50 U.S.C. app. § 2071, again gave the President extraordinary powers to compel acceptance and performance of contracts vital to the national defense.[26]

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[21] Selective Service Act of 1948, ch. 625, 62 Stat. 604, 625-26.

[22] *Id.*

[23] We are now at the intersection of almost three-quarters of a century of war powers laws which created an array of product and environmental hazards with both expanded product liability litigation and a legislated compulsion to remediate environmental damage. Underlying this case is the question of whether the government, having provided for the national defense, will now meet the product liability and environmental consequences of the defense effort.

[24] *See Defense Production Act of 1950: Hearings on S. 3936 Before the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess. 199-200, 278-92 (1950) (side-by-side comparisons of World War II statutory language with proposed statutory language).

[25] S. Rep. No. 2250, 81st Cong., 2d Sess. 1 (1950).

[26] Defense Production Act of 1950, ch. 932, § 101, 64 Stat. 798, 799.

When contractors were compelled to perform military contracts or to take unusual risks during World War II, Congress indemnified and immunized them against liability for commercial contract defaults. By 1950, however, government contractors no longer had such protection. This void was filled by DPA Section 707, a new provision broadly immunizing contractors from "damages . . . for any act or failure to act resulting directly or indirectly from . . . compliance with . . . this Act." [27] The Senate report accompanying the DPA stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter." S. Rep. No. 2250, 81st Cong., 2d Sess. 11 (1950).

When Congress amended Section 707 for clarity in 1952, the Senate report accompanying the amendment again described Section 707 in broad terms:

> The first sentence of section 707 of the act contains the so-called exculpatory clause, which protects a person from liability, under contract or otherwise, as the result of compliance with the act or regulations issued under the act. This provision was included to encourage and assist people to comply with the act, even though it was recognized that common-law doctrines, such as frustration and impossibility of performance and the like, would cover many of the same cases.[28]

Accordingly, Section 707 places the responsibility for the consequences of compelled contracts squarely on the shoulders of the government, which controlled the terms and performance of the contracts.

C. Section 707 Immunizes Contractors from Liability for Damages in Tort or Contract

By its plain language, Section 707 shields a contractor from liability for "damages . . . for any act or failure to

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[27] *Id.* § 707, 64 Stat. at 818.

[28] S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* 1952 U.S.C.C.A.N. 1789, 1818.

act" resulting from compliance with the DPA. This language could not be more encompassing: it contains no words of limitation.

In statutory construction cases, "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The lower court claimed to be reading this plain language when it denied recovery to the petitioners. On the contrary, it construed Section 707 in a manner that denies its plain meaning.

By its language, Section 707 immunizes a contractor from all liability resulting from compelled production, whether arising in contract, tort, or otherwise. There is no indication that Section 707 was intended to excuse only liability under contractual defaults, as the court of appeals held. Indeed, Congress rejected the explicit "liable . . . for any default under any contract" language of the predecessor in favor of the broader "liable . . . for any act or failure to act" language of Section 707. Had Congress intended such a limitation it could very easily and simply have re-adopted the prior language.[29] Instead, the plain language of Section 707 unmistakably expands upon the language of its statutory predecessors. Second, the references to Section 707 in the DPA's legislative history are wholly consistent with the proposition that the immunity language applies to all damages or claims, what-

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[29] *Compare* ch. 199, § 301, 56 Stat. 176, 180 *with* 50 U.S.C. app. § 2157. As previously noted, Congress has expressed no proclivity to limit indemnity to government contractors. To the contrary, Congress has not hesitated to protect government contractors from all the risks that result from government contract performance—even those that sound in tort. *See* 10 U.S.C. § 2354 (1994) (providing indemnification for contracts involving hazardous activities); Atomic Energy Damages Act, 42 U.S.C. § 2014 (1988 & Supp. V 1993) (authorizing indemnification of government contractors from nuclear risks); *see also* 48 C.F.R. § 52.228-7 (1994). The Federal Circuit's view was certainly not premised on considerations of congressional policy.

ever the legal basis. The House report stated: "This section [707] provides an exemption from damages or penalties which might result from compliance with rules, regulations, or orders issued under title I." [30] Similarly, the relevant Senate report stated: "Section 707 contains an exculpatory clause protecting persons who have complied with the act against liability for damages thereafter." [31] When Congress re-examined Section 707 in 1952, it stated that Section 707 "protects a person from liability, under contract or *otherwise,* as the result of compliance with the act or regulations issued under the act." [32]

In sum, the plain meaning, legislative history and historical context of Section 707 all demonstrate that Congress indeed intended Section 707 to immunize contractors from all damages resulting from compelled production. Congress recognized the level of government control over war time contractors was so great that it provided a means of protecting contractors from the results of compelled contracts with the government.

D. The Federal Circuit's Interpretation of the DPA is Wholly Inconsistent with *Boyle*'s Government Contractor Defense and with Indemnification of Contractors Following Government Specifications in *Spearin*

As stated previously, the other protections involved in this case are the government contractor defense set forth in *Boyle* and the warranty of adequate specifications elucidated in *Spearin*. The *Boyle* defense provides shared immunity to protect a government contractor from third-party tort claims. The *Spearin* doctrine indemnifies contractors from liabilities incurred due to reliance on government contract specifications. These protections share

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[30] H.R. Rep. No. 2759, 81st Cong., 2d Sess. 22, *reprinted in* 1950 U.S.C.C.A.N. 3620, 3644.

[31] S. Rep. No. 2250, at 11; *see* 96 Cong. Rec. 10,572 (1950).

[32] S. Rep. No. 1599, *reprinted in* 1952 U.S.C.C.A.N. at 1818 (emphasis added).

a common logical basis: that contracts of adhesion forced upon contractors in the pursuit of important governmental objectives should not be the basis of contractor liability. Section 707, which also protects government contractors performing mandated services for the government, should be construed similarly. When considered in relation to their common purpose, these protections provide indemnity for third-party tort liability, recovery in contract for reliance on government specifications, and, under the DPA, indemnification from all liabilities incurred as a result of the performance of the compelled contract.

The opinion of the Federal Circuit, however, rejected or failed to consider at all the common purpose of this trio of government contractor protections to hold that the DPA will not indemnify contractors for incurred liabilities. *See Hercules*, 24 F.3d at 204. This decision is not only inconsistent with the DPA's text and history, but also with *Boyle* and *Spearin*.

1. *Boyle v. United States*

In *Boyle*, this Court held that a contractor manufacturing products for the government is not liable in tort to third parties if:

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

487 U.S. at 512.[33] These three elements are approval, conformance, and relative knowledge.

The first two elements of the test tie the production of the product to the government's demands. "[A] product

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[33] The Chamber of Commerce, as amicus curiae in *Boyle*, supported establishment of the government contractor defense. *See* Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Boyle v. United Technologies*, 487 U.S. 500 (1988) (No. 86-492).

conforms to reasonably precise specifications if it satisfies an intended configuration even if it may produce unintended and unwanted results." *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 703 (4th Cir. 1989) (internal quotations omitted), *cert. denied*, 495 U.S. 953 (1990). The contractor satisfies the third element by proving the government knew of (or at least the contractor did not conceal) a danger. *Boyle*, 487 U.S. at 512; *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946, 951 n.10 (4th Cir. 1989). The fundamental assumption of these cases is shared immunity in the accomplishment of distinctively governmental objectives. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940) (no liability for contractor doing government's will).

2. *United States v. Spearin*

In *Spearin*, this Court stated that, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." 248 U.S. at 136.

To succeed on an implied warranty claim, the contractor must show: (1) government specifications, (2) with which the contractor complied, and (3) an unsatisfactory result. *R.C. Hedreen Co.*, ASBCA No. 20,599, 77-1 BCA ¶ 12,328, at 59,555.

It is significant that the Court's first application of the government contractor defense was actually premised on the same issues set forth in *Spearin*, i.e., defective government specifications. In *Yearsley*, 309 U.S. at 20-21, the Supreme Court concluded a contractor had no liability for riparian damages caused in performance of a government contract, because there was "no liability on the part of the contractor for executing [the government's] will." In doing so, the Court effectively created a bridge between the logic of the contract-based affirmative relief in *Spearin*, and the logic of more broadly based government contractor

relief as ultimately expressed in *Boyle* and Section 707.[34] The Federal Circuit's decision is inconsistent with this important historical development.

3. *The Lower Court Misapplied* Boyle, Spearin, *and the DPA*

In the instant case, the Federal Circuit held that the petitioners had successfully argued three times that the government contractor defense applied, and therefore concluded that the petitioners faced no real liability. *Hercules*, 24 F.3d at 199. This argument is flawed since the government contractor defense several years prior to *Boyle* was not nearly as developed or certain as it is today. Petitioners argued the government contractor defense, but they simply did not win. *See William T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 21 (1992), *aff'd sub nom. Hercules, Inc. v. United States*, 24 F.3d 188 (Fed. Cir. 1994) (discussing the reasons for settlement). What occurred in settlement—a payment to lay to rest billions of dollars of potential liability—was not a giveaway by some gratuitous abandonment of a sure defense, but rather a recognition that the government contractor defense was uncertain.[35] Because of this uncertainty (fanned by government hostility to the defense) the government contractor defense did not guarantee an escape from liability as

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[34] Likewise, in *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824, 827 (D. Conn. 1965), the court found that a contractor who failed to take precautions to prevent damages during performance of a dredging contract was not liable, since "[t]he Government did not provide for such additional precautions in the plans, and [the contractor] is not to be held liable for this omission."

[35] Although the Agent Orange court (then Judge Pratt), in what was the first "modern" expression of the concept, originally accepted the application of the government contractor defense to this case, the court thereafter (then Judge Weinstein) refused to enter judgment on this basis until there was a class settlement. Moreover, the government—a party to the case—vigorously *opposed* the government contractor defenses. *See id.* at 34-35.

the court of appeals claims. The petitioners faced significant liability under their Agent Orange contracts and were forced to pay damages.

That is precisely where the DPA (and the *Spearin* doctrine) come in. As even the Federal Circuit recognized, the Agent Orange contracts were imposed upon the petitioners through the DPA; they were forced to produce what the government demanded, and they thereafter suffered "liability, under contract or otherwise, as the result of compliance with the act." S. Rep. No. 1599, *reprinted in* 1952 U.S.C.C.A.N. at 1818-19. As such, petitioners are entitled to protection from the consequences of their compliance with government demands.

Unfortunately, rather than reading the DPA, the government contractor defense and the *Spearin* doctrine together as projecting a single public policy, the Federal Circuit read them as providing different and inconsistent bases for relief. *See Hercules,* 24 F.3d at 197. However, as the Chamber of Commerce has shown, these three doctrines have a common purpose and must be read together rather than fragmented. The understanding of a larger objective is necessary in order to fulfill Congress's expectation that contractors doing the government's bidding should not bear costs imposed by the government's decisions. This is in line with the law's mandate that the party compelling the terms and conditions of a relationship with another must protect that party.

II. THE LAW RECOGNIZES THE RESPONSIBILITY OF THE DOMINANT CONTRACTING PARTY FOR THE CONSEQUENCES OF ITS POSITION RELATIVE TO THE SUBORDINATE CONTRACTING PARTY

In the instant case, the government has sought to avoid its responsibility to indemnify the petitioners under contracts it imposed and controlled pursuant to the DPA. Such avoidance is inconsistent with the government's belated position that contractors are protected against lia-

bility for contracts with the government under *Boyle*.[36] However, it is consistent with the government's attempts, in this forum and in many others, to avoid the costs of its past decisions, costs which in many cases are only now becoming clear.

This should not be permitted to happen. The government is and must be responsible for the effects of contracts it forces upon private entities in pursuit of public policy goals. The quid pro quo for the government's determination that national security demands compliance with rated orders is to protect the contractors who perform those orders from the consequences of doing so, regardless of whether the claims against them sound in negligence, strict liability, or otherwise. As shown below, where one contracting party exerts a high degree of control over another, that party must bear the cost and the responsibility for its actions.

The discussion of this concept begins with the general contract law principle of the adhesion contract, the functional equivalent of the contracts in the instant case. In the case of government contracts, the relationship between the government and the contractor is defined by the government's overwhelming power. The relationship does not reflect the consensual agreement of the parties, but rather the government's nonnegotiable demands and the con-

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[36] In the original Agent Orange litigation, the government attacked the government contractor defense, which it then championed to the Federal Circuit in this case. This discrepant invocation of the defense could also be estopped under the doctrine of inconsistent positions. When "the party against whom estoppel is invoked received some benefit from the previously taken position, i.e., he 'won' because of it and he seeks to 'win again' from his original adversary (or one in privity with that person or involved in the same transaction) on a basis which contradicts the prior position," the doctrine will apply. *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1578-80 (Fed. Cir. 1984). Litigants are to be discouraged from playing " 'fast and loose' with the judicial process." 1B James W. Moore et al., *Moore's Federal Practice* § 0.405[8], at III-55 (2d ed. 1994); *Scarano v. Central R.R. of N.J.*, 203 F.2d 510 (3d Cir. 1953).

tractors' submission. A frank recognition of the disparity of power in the relationship leads to the conclusion that government contracts typically are contracts of adhesion.[37]

A. Contracts of Adhesion Are Construed Against the Dominant Drafting Party

It is fundamental to contract theory and interpretation that the parties to an agreement must have the freedom to initiate and negotiate. Such freedom is necessary to bind the parties to the terms of a contract. In this way, the law gives binding effect to the inalienable right of individual liberty. At its core, a binding contract is a private, mutual matter between parties who are free to negotiate terms and conditions.

Contracts of adhesion are generally not private affairs, but reflect a social institution where standard forms are used among parties of unequal bargaining power on a take-it-or-leave-it basis. These contracts are not the result of free bargaining. Accordingly, contracts of adhesion are not viewed through the lens of the traditional common-law rules of contract. *See generally* Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173 (1983). Instead, their terms are subject to judicial scrutiny for reasonableness and "fundamental fairness." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991).

B. Terms in Contracts of Adhesion Can Be Rewritten

There are several remedies for parties subjected to oppressive terms in contracts of adhesion. Courts may strike the entire contract. Alternatively, a court may reform the contract by striking the offending provision, allowing the reasonable expectations of the parties to prevail, amending the contract so that it is objectively fair, or substitut-

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[37] *See* Gilbert A. Cuneo & Eldon H. Crowell, *Impossibility of Performance—Assumption of Risk or Act of Submission?*, 29 *Law and Contemporary Problems: Government Contracts Part II*, 531, 548-49 (1964). The authors conclude that "[c]onditions and clauses in a government contract are on a take-it-or-leave-it basis; there is no freedom of choice." *Id.* at 549.

ing boiler-plate or statutory rules. *See generally* 3 Lawrence A. Cunningham & Arthur A. Jacobson, *Corbin on Contracts* § 559A & C (West Supp. 1994) (hereinafter "Corbin"); *see also, e.g., T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 377 n.90 (5th Cir. 1980) (imputing contractual terms only in contracts of adhesion). "The terms of a contract of adhesion must be reasonably adapted to advance a legitimate purpose of the party that drafted the contract." *Melso v. Texaco, Inc.*, 532 F. Supp. 1280, 1298 (E.D. Pa.), *aff'd mem.*, 696 F.2d 983 (3d Cir. 1982).

C. Allowing the Dominant Party to Avoid Liability Contravenes Fundamental Fairness and the Reasonable Expectations of the Parties

Where contracting parties are freely allowed to negotiate over terms, they are able to give voice to their reasonable expectations. Parties may allocate the risk of consequential damages as they see fit, and the "price" of the contract will reflect the mutual agreement.

In the instant case, however, as with most adhesion contracts, the contractors did not have the option of adjusting the price for greater security. In fact, the contract prohibited the petitioners from protecting themselves in their normal manner of business. For example, the contractors were not allowed to place warning labels on the canisters of Agent Orange and were forced to follow government specifications.

In precluding petitioners from protecting themselves, the government created a circumstance analogous to instances in which a party with greater power than his counterpart drafts a contract of adhesion exculpating himself from liability. Courts routinely strike down exculpation clauses where the draftee is not afforded an opportunity to insure against or otherwise avoid risk. Corbin, *supra*, § 559F (listing cases). Thus, courts will not allow a party with the control over a contract to draft the contract so as to avoid all responsibility for the consequences thereof.

D. No Waiver of Liability Exists for the Government for the Consequences of Its Actions

In this case, fundamental fairness requires that the government not be allowed to exculpate itself from liability or avoid making the contractors whole. Just as if the government had explicitly written in terms to the contracts that disclaimed all liability, the prior rulings in these cases insulate the government from its own conduct. As a matter of fundamental fairness, therefore, the contracts should be reformed to meet the *reasonable* expectations of the parties.

The petitioner-contractors in this case had several reasonable expectations. First, they expected the government to act with candor in requiring the production of Agent Orange. Although the government was in a far better position to assess the potential risks of dioxin, those risks were not disclosed to the contractors. Worse, the government expressly prohibited the contractors from including *any* warning labeling. Yet the government seeks to pass those risks on with impunity. Second, the contractors reasonably expected that the government contract was for a defoliant, and not for, as the Vietnam veterans claim, an instrument of chemical warfare.

Finally, the contractors reasonably expected that should there be consequential damages as a direct result of the government's requirements, the contractors would be made whole because of the protections created by the DPA, *Spearin*, and the (then not-fully-certain) government contractor defense.

Likewise, the government could not have *reasonably* expected that it could design a defoliant with mandated specifications, demand that no warning labels be affixed, draft an agreement encompassing purchase terms as the government saw fit, compel contractors to sign the agreement, and then disclaim all liability for the defoliant. Nothing is reasonable about such expectations.[38]

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[38] Even if this Court does not enforce the reasonable expectations of the contractors, the Court should not enforce the effect

Adhesion contracts are, in and of themselves, virtually unconscionable. *See Harper Tax Servs., Inc. v. Quick Tax Ltd.*, 686 F. Supp. 109, 112 (D. Md. 1988). The essence of unconscionability is "one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power." *Id.* at 113 (alteration in original) (quoting New York Uniform Commercial Code § 2-302 comment 1 (McKinney 1964)). This case is about oppression, unfair surprise, and the lack of an ability to allocate risks. The contractors were forced to assume all of the risk, and as a result, have suffered substantial damages. "Fairness in the private law-making process also requires that drafters of adhesion contracts to [sic] tailor their contracts so as not to impose a greater burden on the stuck party than justified by their fair purposes." Corbin, *supra*, § 559G. Accordingly, the effect of the government's attempt to limit its damages is unconscionable and should be stricken.

E. The Agent Orange Contracts Were Adhesive

The government clearly has the power to impose contracts entirely against the will of a private party. Contracts of adhesion such as the contracts at issue here are " 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather." *Schwartz v. S.S. Nassau*, 345 F.2d 465, 471 (2d Cir.) (quotation omitted), *cert. denied*, 382 U.S. 919 (1965); *see also* Rakoff, *supra*, at 1173.

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of these adhesion contracts. Instead, the Court should strike the offending effect of the adhesion contracts and substitute the statutory rules regarding damages. For example, section 2-719(3) of the Uniform Commercial Code provides:

> Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

U.C.C. § 2-719(3) (1989).

The Agent Orange contracts were compulsory, not voluntary, and therefore were contracts of adhesion. The government drafted the contracts pursuant to the DPA and supplied all specifications. The contractors had no power to determine whether to produce Agent Orange. Indeed, the contracts at issue cannot even be said to have been let merely on a take-it-or-leave-it basis, but on a "take-it-or-go-to-jail" basis. Petitioners had to produce what the government demanded. Petitioners' acceptances of the contracts at issue were not acts of negotiation, but of submission. The government's high degree of control over the contracting process imposes upon it the responsibility, and therefore the costs, of the damages its actions caused.[39]

This enormous disparity in contracting power illustrates the rationale for the indemnity provision of DPA Section 707. The contractors had no true options; they were ordered to produce what the government demanded, *see Hercules*, 24 F.3d at 191, and the dangers were

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[39] Moreover, the government's decisions in the context of wartime deployment involve balancing the defense needs of the nation against the risks to citizens. Such inherently political determinations are nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 226 (1962). As this Court recognized in *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."

From the basic concept that military decisions are nonjusticiable flows the principle that in a government contracts case addressing compelled production of a military product, "[n]o trier of fact can reach the issue of [the] manufacturing defect without eliminating other variables which necessarily involve political questions." *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (political question doctrine rendered manufacturing defect claim against a manufacturer whose missile allegedly malfunctioned and killed servicemen nonjusticiable because claim required judicial investigation into military strategy). Hence, as the claims in this case would require judicial inquiry into wartime government decisions regarding military materiel, the issues in this case are nonjusticiable.

known solely to the government. The contractors were not in a position to protect themselves. *See William T. Thompson*, 26 Cl. Ct. at 20-21 (Thompson had no input regarding Agent Orange specifications and government's level of knowledge exceeded Thompson's). In this circumstance, petitioners' contracts of adhesion with the government should not be invoked against them.

III. THE GOVERNMENT HAS ATTEMPTED TO AVOID LIABILITY FOR THE ENVIRONMENTAL CONSEQUENCES OF ITS WARTIME CONTRACTS

The instant case is not the only one in which the government has sought to avoid responsibility for the consequences of contracts forced upon contractors. Courts have found responsibility, and therefore liability, based upon control over the contracting process in the context of environmental law. In several cases, the government has sought to avoid responsibility for its actions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (1988), just as it has under the DPA; *see Elf Atochem N. Am., Inc. v. United States*, 868 F. Supp. 707, 712-13 (E.D. Pa. 1994) (rejecting government's contention that World War II era pollution at chemical plant could not implicate the government under CERCLA; cleanup liability imposed).

CERCLA imposes liability upon those who have the actual responsibility for, or in some cases, the mere authority to control, disposal of hazardous waste. *See generally* 42 U.S.C. § 9607; *compare Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (plaintiff must allege defendant "directly and personally" engaged in the acts causing environmental damage) *with Nurad, Inc. v. William E. Hooper & Sons*, 966 F.2d 837, 842 (4th Cir.) (individuals "need not have exercised actual control in order to qualify as operators under § 9607(a)(2), so long as the authority to

control the facility was present"), *cert. denied*, 113 S. Ct. 377 (1992).[40]

The government's attempts to avoid owner-operator liability under CERCLA are highlighted in *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994). *FMC* involved World War II contracts for the production of synthetic rubber to aid the United States war effort. The production took place at plants over which the government exerted considerable control. As in the instant case, the government used its wartime powers to compel production. *FMC Corp. v. United States Dep't of Commerce*, 786 F. Supp. 471, 474-75 (E.D. Pa. 1992).

Years later, the Environmental Protection Agency sought to recover cleanup costs at the plant from a subsequent owner, FMC Corporation. FMC sought contribution from the government under CERCLA, claiming the hazardous waste was due to wartime government contracts.

In a divided en banc opinion, the Third Circuit held that the government had waived sovereign immunity to liability under CERCLA, and that given the extent of government control over the facility, it shared cleanup liability. The court concluded "the leading indicia of control were present, as the government determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold." FMC, 29 F.3d at 843.

In responding to the government's claim that a finding of governmental liability would result in costs far in excess of anything Congress could have intended under CERCLA, the *FMC* court noted, "we point out that at bottom our result simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor inconsistent with the policy

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[40] As *Pipefitters* and *Nurad* demonstrate, there is a circuit split concerning the definition of control under 42 U.S.C. § 9607(a)(2).

underlying CERCLA." *Id.* at 846; *see also Elf Atochem*, 868 F. Supp. at 712-13.[41]

Just as the degree of government control over petitioners mirrors that found in *FMC*, the government's attempts to avoid liability in *FMC* are analogous to its actions here. In the instant case, the government, through the DPA, required production of Agent Orange, determined what Hercules and Thompson would produce, set the level of production, and directed its marking and distribution.

Because the government controlled Agent Orange production, it is just that the United States bear the responsibility for and costs of the consequences of its policies under these contracts. To allow the government to avoid the responsibility for its actions would be neither fair nor consistent with the DPA and its underlying policy.[42]

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[41] In different factual circumstances, the government avoided CERCLA liability by arguing that it had insufficient control to be liable as an operator or arranger at a former Hercules Agent Orange plant. *See United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. Mar. 21, 1995) (No. 94-1557). While finding the rated contracts issued to Hercules were "substantially dictated by [the government]," *id.* at 806, the court of appeals also found that the contracts did not address disposal of wastes, and that actual government involvement at the facility was "sporadic and minimal," *id.* at 811. The *Vertac* court also adopted the Federal Circuit's view that the DPA does not provide general indemnity for government contractors. *Id.* at 812.

[42] Another example of the government's responsibility for the consequences of compulsory contracts is found in the context of condemnation law. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The rationale of that clause is wholly consistent with and supportive of petitioners' claims under *Spearin* and the DPA, in that in each situation the party subject to injury as a result of government action is entitled to be made whole.

IV. PUBLIC POLICY REQUIRES THE GOVERNMENT TO BEAR THE CONSEQUENCES OF ITS OWN DECISIONS

Under the War Powers and Defense Production Acts, the government has extraordinary power to compel contractor compliance with public demands. Because of these powers, the freedom to negotiate is missing. As the Federal Circuit itself recognizes, "the Government routinely grants itself privileges—like the right to terminate a contract for the Government's convenience without penalty—that are not available to other contracting parties." *S.J. Amoroso Constr. Co. v. United States*, 12 F.3d 1072, 1079 (Fed. Cir. 1993) (Plager, J., concurring). There can be no pretense that the contracts at issue were bargained for and executed with equal bargaining power on both sides—rather, the law and the facts surrounding them suggest they were in fact contracts of adhesion.

Fundamental fairness requires that the government not be permitted to escape liability for damages suffered by contractors through third-party tort actions arising directly out of obligations imposed because of such contracts.[43] The rulings below wrongly insulate the government from the consequences of its conduct. The contractors reasonably expected to be protected from liability that arose through the contracts—by the *Spearin* doctrine for contract claims, by the *Boyle* government contractor defense for third-party tort claims, and by DPA Section 707 for other liabilities incurred in contract performance. These reasonable expectations are being frustrated by the government's attempt to avoid responsibility for the consequences of actions it required the petitioners to take. Petitioners had to produce what the government wanted, according to the government's terms. The petitioners effectively lost the right to their physical plant, the choice

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[43] This Court has stated "where the contract is one of adhesion, where there is great disparity in bargaining power, . . . other legal consequences may ensue." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972).

of whether or not to engage in business, and the choice of what to produce.[44] Were it not for the protection provided by *Spearin*, *Boyle* and Section 707, these actions would violate the Fifth Amendment prohibitions against government seizure of private property without just compensation.

In sum, that the government may not force private entities to bear the costs of public benefits is basic to democratic government. As one of the founders observed, "[g]overnment is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man, whatever is his *own*." James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed., 1906), *quoted in Winstar Corp. v. United States*, 25 Cl. Ct. 541, 548 (1992), *rev'd, petition for reh'g en banc accepted, vacated*, 994 F.2d 797 (Fed. Cir. 1993).

To view Section 707 as permitting the government to force liability, as well as production, upon a contractor is inconsistent with its historical meaning and with other doctrines protecting contractors, and offends basic notions of the sanctity of property. For constitutional as well as legal reasons, the Federal Circuit's decision that the DPA protects a contractor only against third-party breach of contract claims is unsound.

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[44] In this regard, *see Holodnak v. Avco Corp.*, 514 F.2d 285, 289 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975) (government insinuated itself to such an extent into business of contractor that it was a "joint participant" in contractor activities).

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests that this Court reverse the decision of the Federal Circuit and remand this action for further proceedings.

Respectfully submitted,

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Dated: June 19, 1995

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QUESTION PRESENTED

A manufacturer's admittedly defective herbicide "conscripted" for use by the United States in Vietnam caused injuries to veterans of the United States Armed Forces, many of whom were themselves conscripted into service, and who were then denied— through the judicial creation of legal doctrines consistently favorable to the manufacturer—a full and fair opportunity to recover damages from the manufacturer for their crippling and fatal injuries.

Is it "obviously right" for this Court, at the request of the manufacturer, to now create additional new doctrine requiring the United States to indemnify the manufacturer for certain costs associated with the manufacturer's avoidance of trial, and any substantial liability to those veterans, and their families, who were injured as a result of exposure to dioxin in the manufacturer's herbicide, when that dioxin was not included in the government's design specifications for the herbicide but the courts nevertheless deemed the government contractor defense applicable to the petitioners?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Agent Orange Coordinating Council ("the Council") is a unique coalition of veterans organizations committed to obtaining justice for Vietnam veterans exposed to herbicides known as Agent Orange. Inspired by the leadership of the Council's Chairman, Admiral Elmo R. Zumwalt Jr., (USN Ret.)—who during the Vietnam War served as Chief of Naval Operations, and more recently was the Special Assistant to the Secretary of Veterans Affairs—twenty-one service organizations chartered by Congress to represent the interests of veterans and their families, and nine non-chartered veterans' organizations, joined together in support of the petitioners to this Court in *Ivy v. Diamond Shamrock Chemicals Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991), *aff'd*, 996 F.2d. 1425 (2d Cir. 1993), *cert. denied,* 114 S.Ct. 1125 (Feb. 22, 1994) ("*Ivy*"). The Brief *Amici Curiae* of Agent Orange Coordinating Council, The American Legion, Veterans of Foreign Wars of the U.S., Disabled American Veterans, Amvets, [et al.] in Support of Certiorari, filed therein on January 27, 1994, cited the purposes for which Congress chartered some of the constituent organizations of the Council, such as "to uphold and defend the Constitution," 36 U.S.C § 43, to promote "fidelity to its laws," §823(a), and "to encourage the doctrine of universal liberty, equal rights and full justice to all," §2702(5); to "stimulate to the highest degree possible the interest of the entire Nation in the problems of veterans, their widows, and orphans," and "to foster love for the principles which they have supported by blood and valor," § 57(a).

This second *amicus* Brief submitted to this Court by the Council is intended to serve these same goals. The specific interests of *amicus* in this case, in light of the considerations discussed more fully in the Statement of the Case, are:

1) to provide a context from the perspective of the injured serviceman for understanding this case, which is about the legal consequences to defense contractors from furnishing defective products that allegedly injure members of the Armed Forces;

2) to assure that the historical record concerning the injustice suffered by veterans exposed to Agent Orange is not beclouded, in this sole case concerning Agent Orange accepted for review by the Court, as a result of legal or factual assumptions, or incidental comments, that are not fully informed, and sensitive to the concerns and painful inequity suffered by the injured veterans;

3) to express a sense of extreme concern by the injured veterans that, while they have been unjustly denied —through the invention of a series of novel doctrines of law for no apparent reason other than to protect the financial welfare of the manufacturers of Agent Orange—any substantial remedy against the manufacturers whose defective product destroyed their lives, the federal judiciary should not compound this injustice by creating further doctrine from scant and unpersuasive source material that would protect the wrongdoers from any financial responsibility whatsoever for the injuries they caused veterans and their families;

4) to protest against the proposition of petitioners that United States taxpayers should subsidize the costs of the manufacturers' collusive class action settlement, the vehicle by which veterans were denied their due process rights in the federal Agent Orange litigation; and

5) to protect the interests of present and future members of the United States Armed Forces, who are the potential victims of future such defective products, by supporting the United States' position in this suit that the minimal financial deterrent to a manufacturer of defective products that injure servicemen should not be nullified by means of the taxpayer indemnification of tort litigation expenses that is proposed by petitioners in this case.

STATEMENT OF THE CASE

1. The *Ivy* Case

In *Ivy v. Diamond Shamrock Chemicals Co.*, *supra*, some of the possibly 90% of all veterans injured by dioxin contaminant in petitioners' Agent Orange who suffered their injuries only after a May 1984 settlement, and following a latency period from the date of exposure that averages 20 years, filed a class complaint in Texas state court. These veterans were absent from, unrepresented in, and ultimately disserved by the May 7, 1984 "nuisance value" settlement of Agent Orange claims, which is the subject of this case.

The *Ivy* plaintiffs argued both constitutional and factual reasons why the 1984 settlement could not and did not apply, without their knowledge, consent, or adequate representation, so as to extinguish, in advance, their then merely potential future claims against the manufacturers of Agent Orange. They submitted weighty new evidence that Agent Orange was the cause of their injuries and cited authority that this Court's definition of the government contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) would preclude its application to their case. *See Joint Eastern and Southern Dist. Asbestos Litig.*, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990); *cf. In re Agent Orange Product Liability Litigation*, 611 F.Supp. 1223 (E.D.N.Y. 1985) *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (summary judgment).

Ivy was transferred from Texas on questionable grounds, *see Ivy v. Diamond Shamrock Chemical Co.*, 901 F.2d 7 (2d Cir. 1990), to Judge Weinstein in Brooklyn, N. Y., who then denied the veterans discovery or trial on the disputed factual issues, found the claims properly removed from state court on novel grounds, and dismissed them on grounds that all future Agent Orange claims by veterans had been settled by him in 1984, albeit unbeknownst to the plaintiffs themselves. His decisions were upheld by the Second Circuit, which added its own factual conclusions contrary to both Judge Weinstein's

assumptions and to the evidence in the record.

The Circuit also ignored by misinterpretation plaintiffs' claim that Judge Weinstein's role as sole fiduciary for a $52 million foundation (the "Agent Orange Class Assistance Program") which would lose $10 million if *Ivy* succeeded in state court (according to Judge Weinstein's interpretation of an indemnity provision), combined with Judge Weinstein's express reliance on this potential $10 million loss as a reason for denying remand of *Ivy* to Texas, 781 F. Supp. at 911-12, 915, 918, constituted an obvious judicial conflict of interest in violation of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Judge Weinstein's assumption that remand of *Ivy* would "consume the $10 million set aside" in his foundation, 781 F. Supp. at 918, expressed his judgment that some *Ivy* plaintiffs and putative class members would in fact win their claims if remanded to state court. The Circuit assumed the contrary by ignoring evidence in the record and drawing on literature it found outside the record. Mrs. Ivy's Petition to this Court, No. 93-860, followed on November 24, 1993.

Amici in *Ivy*, cumulatively representing 8 million Americans in an unprecedented unanimous effort in this Court by all significant official veterans organizations, sought to fulfill the statutory goals stated above by impressing upon this Court the importance of the *Ivy* Petition. *Amici* strongly urged this Court to restore to Agent Orange victims their "fundamental constitutionally derived ... right to have grievances adjudged by a jury of one's peers." They criticized the "wholesale abandonment" by the federal courts of those due process rights that were "systematically denied" to the veterans in order to impose upon them the same 1984 settlement that is the subject of this case.

Recognizing the flaw in the Circuit's reasoning in imposing the settlement on the *Ivy* plaintiffs, *amici* observed that, "[f]ar from providing 'full justice,' the cruel result of that settlement has been to restrict Vietnam veterans and their dependents to the receipt of nuisance value recoveries of

approximately $3200 when they suffer total disability or when they die as a result of their exposure to products manufactured by [Hercules, et al.]." Lesser injuries received no compensation at all under the 1984 settlement.

Amici therefore "advised" this Court, as they felt "duty bound" to do, to review and ultimately reverse the "Second Circuit's extraordinary disregard of [the veterans'] due process rights" and its "usurpation of legislative and judicial powers" by imposition of an unwanted "settlement" on the *Ivy* petitioners, in a "travesty of justice." The Brief *Amici Curiae* supported the *Ivy* Petition because the federal courts' "decisions ... create a threat to settled law, to constitutional values of due process, and to the welfare of thousands of severely ill veterans and their families." *Id.*, at 2-6, 20.

In addition to this strong urging from all of the country's oldest, largest, and most deeply respected patriotic organizations, the highest group of legal officers in the land, by their filing of *amicus curiae* briefs in this Court, also unanimously requested that this Court grant the veterans' Petition for review. The attorneys general of all fifty States, in their wholly unprecedented unanimity of support for a private party, or any party on Petition for Writ of Certiorari, expressed the generals' firm opinion that the federal courts "*ad hoc* interference" had wrongly deprived Vietnam veterans of a chance to present their due process claims in an impartial State forum. Brief *Amici Curiae* of the States of Texas (et al.), No. 93-860, 1.

The *pro bono* attorneys for the *Ivy* petitioners, led by Harvard Law School Professor Lawrence H. Tribe, who is at the same time a leading academic and perhaps the foremost constitutional litigator of his era, had sought Supreme Court review not only of the substantial Due Process Clause issues addressed by the veterans organizations' *amici* Brief, but also of a "radical All Writs removal doctrine" by which the federal courts had acquired jurisdiction over *Ivy*, against the strong opposition that the States' attorneys general expressed, in turn, to all three levels of the federal judiciary.

The "All Writs removal doctrine" applied in *Ivy* was an unprecedented interference with states' rights to control claims arising exclusively under state law in state courts between state citizens. This doctrine postulated, in Professor Tribe's paraphrase, that by using their general equity powers "federal judges may circumvent ... seven removal statutes ... 'to remove an otherwise unremovable state court case,' in the discretion of the judge, 'when the need arises." Petition for Writ of Certiorari, No. 93-860, at pp. i and 25.

This discretionary removal technique had been used by the federal courts in *Ivy* to acquire jurisdiction so as to assure that no state court would be able to follow existing law and accord to the Agent Orange veterans their constitutional right to a jury trial of their claims. This foreclosed any state court from putting to the test the federal courts' erroneous, and unenforceable edicts on contested issues of fact which underlie their cheap settlement, and which now reappear as unsettled issues in this case. These issues are, most importantly, the government contractor defense and causation. Both questions were kept from a jury by unorthodox procedures in the federal courts that conferred enormous financial benefits on the manufacturers.

This Court's denial of *certiorari* in *Ivy* had the effect of leaving unreviewed the Circuit Court's significant and novel rulings of law, and its erroneous assertions of fact that cavalierly invaded the province of the jury. This Court's denial of *certiorari* in *Ivy* consequently left uncorrected one of the most profound and, in both money terms and human terms, perhaps the greatest injustice at one stroke in the history of American jurisprudence.

Having presented highly substantial legal and constitutional claims with their impressive academic and unprecedented official legal support, alongside the equally unprecedented solidarity of the official veterans service organizations, all as described above, the affected Vietnam veterans were appalled, shocked, and numbed by the refusal of even four of nine judges constituting the highest court of the country for

which they risked their lives and their health, in one of its dirtiest and most difficult wars, to find the time and interest to review the substantial legal issues presented by their Petition, on matters of life and death to them.

These deserving, patriotic Americans were left with a bitter taste of injustice, not even certain that the law invoked by New York federal courts to provide a veneer of legality to the injustice done them is the same law that governs every other American. This perception of injustice and discrimination deepened when the Court within weeks of rejecting the *Ivy* case heard and decided legal issues similar to those raised by *Ivy*, in such cases as *Ticor Title Ins. Co. v. Brown,* 511 U.S. ___, 114 S.Ct. 1359 (April 11, 1994) (*certiorari* dismissed as improvidently granted, after argument was heard, March 1, 1994, on the due process rights of absent class members); *Kokkonen v. Guardian Life Ins. Co. of America,* 114 S.Ct. 1673 (argument heard March 1, 1994, on the existence of inherent post-dismissal federal jurisdiction to enforce settlement agreements); *Liteky v. U.S.,* 114 S.Ct. 1147 (March 7, 1994) (addressing less persuasive conflict of interest recusal of federal judge than presented in *Ivy*). *Cf. Hess v. Port Authority*, 8 F.3d 811, *cert granted,* 114 S.Ct. 1292 (March 21, 1994) (governmental immunity). None of these cases impressed veterans as being nearly so significant as their own case, by any standard of measurement.

Now veterans perceive as adding an even deeper insult to their grave injuries that the Supreme Court has deemed the Agent Orange manufacturers' highly "implausible" claim, *see* Brief for the United States in Opposition (etc.)("Opp.") at 13, for indemnification by the United States, which is financially worth only a tiny fraction of the veterans' destroyed claims, to be of sufficient import as to occupy space on the Court's calendar which no one of the veterans' numerous petitions were deemed to merit. This will be the only Agent Orange connected case to be addressed by the Supreme Court out of at least 12 petitions over the years.

Little more than one year ago as many as 250,000 potential members of *Ivy's* proposed class of injured Vietnam veterans residing throughout the nation, 8 million of their sympathetic brethren speaking through their congressionally-chartered organizations, and the highest legal officers of all 50 states, were denied this precious opportunity for a hearing involving the same subject matter and some of the very same issues raised by two manufacturers in this case. The difference between these two cases is that the veterans in *Ivy*, and supporting *amici,* naively expecting justice to be blind, started their analysis from traditional and established principles of law, demonstrated wide and deep support for these principles, and were then systematically denied the results that the unbiased application of those principles would yield.

By contrast, the two petitioners here frankly appeal to the result-oriented jurisprudence they have come to expect in the Agent Orange litigation. They start with the result they seek, indemnification of settlement expenses, deliver self-interested *amicus* support for that result, and then "search[] for the proper legal theory upon which" to base that result. *See* Brief of Petitioners ("Br. Pet.") 16. A further difference is that while the thousands of injured United States veterans were innocent of any wrongdoing, and happened to be placed in harms way as a result of their unrewarded, patriotic service to their country, the manufacturers of Agent Orange, including petitioners here, were wrongdoers who sold a defective product at market rates to the government, and to commercial users, and are powerful enough to get away with it.

2. Petitioners' Complaint

With this Court's denial of certiorari in *Ivy*, the Agent Orange manufacturers reaped the enormous benefit of the collusive bargain they struck in *Ryan v. Dow Chemical Co.*, 618 F.Supp. 623 (E.D.N.Y 1985), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). This

settlement in *Ryan*, imposed on the *Ivy* class against their knowledge or will, was purchased by the manufacturers at the cost of a $180 million payment to the District Court for distribution in the District Judge's discretion. At least $13 million was distributed to the attorneys who signed the class action settlement, $52 million went to the "AOCAP Foundation" controlled by the same judge who approved the settlement, and a large unknown amount went to pay the administrative costs of various consultants and staff hired by the judge. Only "nuisance value" amounts were paid from the remainder, plus the interest accrued over the ten year pay-out period, to the fraction of the injured veterans who had death or total disability claims acceptable to the administrators of the fund.

Now petitioners, who shared fully in the windfall benefits of this "settlement" of Agent Orange claims against them, complain that they should recover from the United States their portion of the expenses paid to obtain the immunity from liability against all the veterans' present and future claims that their "settlement," as interpreted in the *Ivy* case, bought them. Petitioners' claims are before this Court on dismissal of their complaints, as affirmed by the Court of Appeals. The question before this Court is whether the complaints are sufficient to state a claim, assuming to be true all factual statements in the complaints that are not inconsistent with any facts established by law.

The petitioners bring an action for breach of implied warranty, which is available under *United States v. Spearin*, 248 U.S. 142 (1918), where a defect "in the plans" provided by the government created liability to its contractor for damage caused by strictly following those plans. Br. Pet. at 17. The petitioners also claim that a provision in the Defense Production Act ("DPA"), 50 U.S.C. app. § 2061, *et seq.*, (1988 & Supp. V 1993) may be read to convey not just an immunity against breach of contract claims caused by the government's requisition of goods away from prior commercial commitments, but also to provide the government's

indemnification of expenses incurred in defending tort claims that arise from defects in the goods that predated and lacked any causal relationship to the requisition. At bottom, petitioners plead that the facts which they portray deserve the creation of some doctrine, from the easily distinguishable materials they cite, allowing them to recover their costs from government.

Petitioners argue that the government's "specifications were defective because they resulted in a product that contained dioxin, the substance that the Agent Orange plaintiffs claimed caused their injuries." Br. Pet. 26. Petitioners complaints do not allege that the government's specifications called for dioxin as part of the Agent Orange formulation, or that there was no way to make Agent Orange without contamination from dioxin. Nor do petitioners claim that the procurement officials who purchased petitioners' Agent Orange either knew that petitioners' Agent Orange did contain dioxin, or knew the process for ridding their product of dioxin. Nor do they claim that everything in the files, or past reports, of the government may be imputed to procurement officials.

Hercules does describe how it managed to avoid contaminating its herbicide with dioxin approximately one year after it started production of Agent Orange. Complaint, at Joint Appendix ("J.A.") 11-12.

SUMMARY OF ARGUMENT

Veterans in *Ivy* fought hard for an unbiased state forum to adjudicate the issue of whether they settled for "nuisance value," in 1984, claims that did not then exist. Instead, this question was answered by federal Judges Weinstein and Van Graafeiland in opinions that interfered with state proceedings in order to impose the courts' own result-oriented rulings denying veterans their right to a day in court. To support their desired result of a cheap global settlement of Agent Orange claims, the federal courts opined that the veterans

could not win their claims anyway, and made summary findings, or speculations, concerning key questions of fact, that were themselves inconsistent. Their opinions substituted the judges' rationalized policy preferences for established rules of law, all to the benefit of the manufacturers.

The manufacturers now seek to exploit to their own further advantage, those inconsistencies that were the byproduct of the instrumental, unprincipled approach to judging that characterized the Agent Orange litigation.

Petitioners' effort to obtain reimbursement for their relatively small share of the "nuisance value" payments and legal expenses the manufacturers made to secure a collusive settlement with class action plaintiffs' lawyers is unsupported by existing law, and is not "an obviously right result." Br. Pet 16. It would be an obviously wrong result for federal courts to create new doctrine requiring taxpayers to assume petitioners' costs of making a corrupt, collusive settlement by which Vietnam veterans were denied an opportunity for a day in court against those who caused their injuries. Federal courts have provided too many such benefits to petitioners.

Petitioners should not be allowed to exploit the ambiguities and inconsistencies created by the unique result-oriented procedures in the *Agent Orange Litigation* to create special new doctrine that would circumvent the limitations of existing government contract law, for the purpose of again rewarding these particular manufacturers with additional protection against liability for their own wrongdoing.

Neither *Spearin* nor the DPA can be interpreted to accord the relief requested by petitioners on the facts petitioners have pleaded without doing violence to those provisions. *Boyle v. United Technologies Corp.*, *supra*, draws a well-defined boundary between those cases where the cloak of governmental responsibility and immunity is cast over the conduct of a governmental contractor that damages a third party, on the one hand, and those cases where the contractor itself must take responsibility for damage which it has caused, on the other. This Court's decision in *Boyle*

extended sovereign immunity principles to protect government contractors from third party claims, thereby shifting the burden of loss to innocent victims precisely in those situations where the government, not the contractor, was responsible for the damage due to its exercise of discretion to approve a defective design.

Neither *Spearin*, the DPA, nor any equitable doctrine should impose on the taxpayer a further obligation to reimburse the losses of contractors who cannot satisfy *Boyle*. If the government is not held responsible, on the basis of an exercise of its discretion to contract for defective design specifications, then there is no justification for shifting the burden of loss away from the manufacturer, whether to the innocent victims, or to the government. A manufacturer should be responsible for defects which it introduces in its product. This constitutes the only real deterrent to future such mass injuries as those suffered by the Agent Orange victims.

Petitioners' complaints on their face show that they cannot satisfy either *Boyle* or *Spearin*, because the dioxin is not alleged to be part of the government's design specifications. *See generally*, United States' Memorandum, J.A. 34. Petitioners' settlement payment was a measure of petitioners' assessment of their risk from the potential inapplicability of the government contractor defense, if not in the present certainly in the future. Their settlement was far more a purchase of insurance-like protection against future claims that would not be barred by this defense, such as those in *Ivy*, than it was a settlement of present claims. If these future claims would not have been barred by the government contractor defense, petitioner must absorb its own expenses in "settling" these claims. *Boyle* provides the exclusive protection for any claims that would have been barred by this defense

ARGUMENT

Petitioners' claims fall between two stools. On the one side sits the alternative that petitioners' equitable plea for relief against the government could be justified by facts showing that the government is responsible for defective design specifications that injured veterans. In such circumstances, *Boyle*, or even the broader government contractor defense created to immunize petitioners from liability in the *Agent Orange Litigation*, is petitioners' sole remedy for otherwise valid claims against them by third parties. Although it is true that the contractor's defense was not well defined at the time of the 1984 settlement, all versions protected contractors who were not at fault, or in the *Agent Orange* version, even where they were at fault. *Joint Eastern and Southern District Asbestos Litigation*, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990). Under facts where the government is responsible for a design that injures third parties, a government contractor may assert the government's sovereign immunity and thereby avoid liability. There is no need for an indemnification remedy against the government in such circumstances, and none exists.

On the other stool sits the alternative suggested by facts both stated and pregnantly not stated by petitioners. Under these facts: petitioners were responsible for the defect which caused the veterans' injuries; *Boyle* would not have furnished a conclusive defense against the veterans' Agent Orange claims; and a jury would have probably found against petitioners on that defense and causation, notwithstanding judicial statements to the contrary. In such circumstances, neither equity nor law would support a government indemnity of contractors against liability for their own negligent acts that cause injury to third parties.

To the government it is irrelevant on which of these two stools this case rests. For that reason Judge Plager's statement, quoted by petitioners, about the ultimate resolution of this issue being unknown, Br. Pet. 18, (which itself only

reflects an insufficient understanding of the underlying facts), is irrelevant. Under either of these factual alternatives, petitioners' attempt to obtain indemnification must fail. Therefore petitioners' highly fact-bound argument aims squarely between these two stools.

Between these two stools is the collusive class action settlement by which federal courts, speaking out of both sides of their mouth about factual issues, ultimately protected petitioners from enormous potential liability to veterans injured by Agent Orange. Had the veterans not been sold out by a collusive class settlement of benefit primarily to petitioners and class action lawyers, with the blessing of the federal judiciary, they would have presented the contested factual issues of causation and of the government contractor defense to juries. Juries eventually would have accepted the mounting evidence of causation and also rejected the applicability of the contractor's defense, as did Judge Oakes in *Joint Eastern and Southern District Asbestos Litigation*, 897 F.2d at 634-35 & n.8. Offensive collateral estoppel would then have stripped petitioners of the defense for subsequent claims, *see Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322 (1979), and the damages for the subsequent provable claims would have been enormous. It is with some understatement that petitioners state: "the settlement that [the manufacturers] accepted was significantly lower than their exposure at trial." Br. Pet. 27. *Cf. id.* 19 ("possibility of ... billions of dollars").

Petitioners avoided a legitimate risk of exposure at trial, but now want to reverse the key positions that they took, and that the courts adopted, which helped them avoid any significant liability, *i.e.,* that the veterans lacked evidence sufficient to go to a jury on either causation or the government contractor defense.[1] Now petitioners claim that

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1 Shortly after issuing its ruling in *Boyle*, 487 U.S. 500, this Court denied a writ of certiorari to review the summary judgment against the opt outs from the settled Agent Orange case, which

their product was defective, that it probably did injure veterans, and that a jury may well have ruled against them on the government contractor defense. This is closer to the truth. But the question is why petitioners should not be bound by the federal courts' contrary summary rulings, however remote from the facts, that nevertheless served to permanently strip the veterans of their rights for the purpose of rescuing petitioners from the risk of enormous liability.

If these rulings denying causation and applying the contractor's defense were good enough to inflict one of the greatest injustices in the history of the federal judiciary on injured Vietnam veterans, they are good enough to estop petitioners from questioning them in this suit. Petitioners have sought and embraced the full effect of the settlement, even against future claimants. They should not be allowed to now reject its factual premises, appealing to the "realities of litigation," for the purpose of avoiding even the minimal expense associated with obtaining their collusive settlement.

It would be a perversion of justice to permit petitioners to accept the windfall advantage given them by federal courts against the veterans, and then, against the government, deny the very rulings from which they benefited.

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was based on the government contractor defense. *See In re Agent Orange Product Liability Litigation*, 487 U.S. 1234 (1988). It has been noted that the Supreme Court's action is significantly confusing" because the "two tests are significantly different." Mary C. Hensinger, *Agent Orange and Boyle*, 6 J. OF CONTEMP. HEALTH L. AND POLICY 359, 374 (1990). The Court had denied the writ to review the contemporaneous settlement case some months prior to deciding *Boyle*. *See id.*, 484 U.S. 1004 (1988). Thus the Court had presumably held the summary judgment petition in abeyance pending its decision in *Boyle*. The Court's failure to remand for reconsideration in light of *Boyle* suggests that the Court agreed that a jury could not have found against petitioners on the government contractor defense even under the more conservative *Boyle* test.

I. PETITIONERS HAVE ALREADYRECEIVED EXCESSIVE BENEFITS FROM THE FEDERAL JUDICIARY IN AGENT ORANGE LITIGATION

Petitioners' positions on key issues of fact in this case further support the veterans' evidence that they were the victims of an enormous miscarriage of justice systematically carried out by the federal judiciary for the benefit of the manufacturers of Agent Orange.

A. Corporate Negligence Caused The Product Defect

Petitioners admit that their product was defective in that it contained dioxin. Br. Pet. 13. Without this allegation they could not maintain a breach of warranty claim.

Moreover, Hercules' Complaint, at J.A. 11-12, describes how Hercules, within a year after it started production, managed to avoid contaminating its herbicide with dioxin. Its excuse for not doing so prior to that date is apparently that it did not know about the extraction process. Therefore, after 1966 Hercules produced defoliant in accordance with government specifications by combining commercially available chemicals in certain concentrations. But before that date it failed to fully comply with those specifications by also including dioxin contaminants in its delivered product.

Petitioners do not claim that they took reasonable steps to determine whether production processes that they used would create dioxin as an unwanted byproduct. Nor do they assert that the government was the only source of such knowledge, or that any existing government information about dioxin contamination was secret, or not generally available to petitioner upon reasonable inquiry. Instead petitioners admit that they may have had less knowledge than other manufacturers about dioxin. Br. Pet. 19.

The same failure of pleading is true of the dioxin extraction process, about which petitioners have failed to plead any excuse for their lack of timely knowledge. Only if the government somehow actively maintained secrecy

about these two issues, thereby frustrating reasonable efforts to acquire the information—obviously not the case here and not alleged—could the government be responsible for the product defect resulting from petitioners' own ignorance.

Since petitioners' complaints provide no such factual allegations, the conclusion remains that the petitioners' negligence in failing to locate an existing extraction process for eliminating dioxin from its Agent Orange product *prior* to initiating production caused their product to be defective. The complaints show nothing in the government's product specifications that either requested or required a product containing dioxin. Nowhere do the complaints state facts showing that it was impossible to deliver a product consistent with the government's specifications that did not contain dioxin.

Petitioners are legally bound by the factual findings on this issue against them in *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934 (E.D.N.Y. 1992) (remanding civilian claims to state court), *appeal denied*, No. 92-8008 (2d Cir. May 8, 1992)(mem.), *cert. denied sub nom. Dow Chem. Co. v. Brown,* 113 S.Ct. 599 (1992) ("*Brown*"). In the *Brown* case, Judge Weinstein held:

> Agent Orange was a mix of pre-existing chemical formulae that had long been put to domestic commercial use ... The government sought only to buy ready-to-order herbicides, not to cause, control or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries. The necessary direct and detailed official control over the acts for which the defendants are now being sued is therefore lacking.

781 F.Supp. at 950-51.

Because petitioners had a full and fair opportunity in *Brown* to prove that the government did have such control over petitioners' production, they would thus be collaterally estopped from arguing that the government forced them or

ordered them, see Br. Pet. 28, to produce a defective product. *See Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322 (1979). Without such control, by which the government must take responsibility for design specifications containing dioxin, petitioners can prevail neither on the government contractor defense nor its *Spearin* claim.

B. The Product Defect Caused Injury to Veterans

Although it has never been legally established that exposure to dioxin caused the various injuries suffered by Vietnam veterans, this is more due to the extraordinary handling of the veterans' claims by the federal courts which denied the veterans access to a jury on this issue, than to lack of evidence. Petitioners are reluctant to directly admit that dioxin in their product caused the injuries claimed by veterans. Therefore petitioners recruit an *amicus* who is willing to perform that service for them. The financial relationship of this *amicus* to petitioners is discussed below, pp. 26-27. In any event, petitioners must and do assume that a jury could have found in favor of the veterans even on the weak facts presented in 1984. See Br. Pet. 19. Since those facts were far weaker than the evidence of injury developed after that date, some of which evidence is sketched in the *amicus* brief procured by petitioners, it is crystal clear that many claims in the *Ivy* class were sufficient to be submitted to a jury on the question of causation.

This demonstrates once again that the veterans suffered a gross injustice from which petitioners greatly benefitted when the Second Circuit made erroneous findings of fact, invading the province of the jury, in reliance on texts not of record, and certainly not sworn to, 996 F.2d at 1437, and at the same time chose to totally ignore the sworn testimony on the record of the veterans' expert witness. The veterans' witness, Dr. Cate Jenkins, a scientist with the Environmental Protection Agency, in her filed Affidavit of Cate Jenkins, Ph.D, (EPA), *Recent Scientific Evidence Developed After 1984 Supporting a Causal Relationship Between Dioxin and*

Human Health Effects, (September 3, 1991), set out some of the copious evidence, developed after the date of the settlement, associating dioxin with the types of injuries suffered by Vietnam veterans.

Dr. Jenkins' Affidavit was cited in, and confirmed in relevant respects by, the authoritative National Academy of Sciences' Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (July 27, 1993). However both studies were entirely ignored by the Second Circuit which was intent on finding, on the basis of obscure and outdated literature consulted *sua sponte*, that Agent Orange did not injure veterans. The Circuit also ignored *Overmann v. Syntex (USA) Inc., et al.*, No. 852-02681 (Div. 5, Circuit Court, City of St. Louis, Mo. July 10, 1991) in which a jury awarded a worker's family damages for a cancer fatality caused by exposure to Agent Orange chemicals.

Hercules attempts to muddy the issue of causation by claiming that "[a]s a result of ... specifications and requirements" under the Defense Production Act, Agent Orange was packaged without warnings. Complaint, Para. 20. In briefing this issue on summary judgment in *Ivy* the manufacturers were unable to produce any contractual or regulatory authority which had in fact precluded warnings of some kind, nor did they reveal any efforts by the manufacturers to question whether all kinds of warnings were precluded. The complaints are deficient in failing to allege facts necessary to raise a question whether any government limitations on specific warnings caused the veterans' injuries.

Similarly Hercules asserts that the government used Agent Orange in "unprecedented quantities, concentrations and rates of applications." *Id.* Para 23. But upon challenge by plaintiffs in *Ivy*, the manufacturers were unable to produce any scientific evidence whatsoever that any of these factors affect the number of injuries otherwise expected on a straight line proportional relationship between exposure to increasing quantities of dioxin and number of injuries.

There is no evidence that dioxin is safe at any minimum level of exposure, and petitioners make no allegation that it is. Each amount of dioxin carries a certain risk of injury irrespective of the delivery mechanism, concentration, or rates of application. It is both unremarkable and foreseeable that the more poison that petitioners produced, the more injuries they would cause. Petitioners' allegations therefore fail to set forth a legal or factual claim of causation, beyond mere innuendo, that the government's mode of distributing dioxin affected in any material way the risk associated with the dioxin produced by petitioners.

C. The Federal Judiciary Served the Manufacturers' Interests by Forcing a Cheap Global Settlement on Unwilling Veterans

Petitioners complain that Judge Weinstein was inconsistent in his rulings, and even that they "entered the settlement under duress" from him. J.A. 26-27. At bottom this seems to be the wrong for which petitioners seek equitable relief, as if taxpayers were guarantors of regular procedures in the federal courts. Petitioners seem to complain that since they were unable to depend upon consistent rulings from the court, they were forced by "realities" to settle even though they had adequate defenses.

Judge Weinstein clearly talked out of both sides of his mouth in the Agent Orange litigation, as petitioners point out. On the one hand he holds that the government contractor defense raises questions for the jury, Br. Pet 6; then he refuses to give those questions of fact to a jury, as required by *Boyle*. One day Judge Weinstein says that Agent Orange claims raise a "possibility of an ultimate liability," claimed to total billions of dollars. Br. Pet 8. Then he dismisses the claims, making them valueless, or nearly the same, forces their settlement for "nuisance value."

In *Ivy* Judge Weinstein again properly assumed that if the veterans were allowed to pursue their claims in state court,

they would recover $10 million, at least. To prevent that from happening he invented a new doctrine to justify removal of *Ivy* from state court. The Second Circuit in *Ivy* participated in the same pattern, by ignoring both evidence before it, and the District Judge's assumption, to deny that the veterans could win their claims. This intentionally distorted view of the facts rationalized the Circuit Court's denial of the veterans' due process rights. 996 F.2d at 1237.

This inconsistency in various factual rulings, however, was not "ironic[]" as petitioners suggest, Br. Pet. 21, but rather calculated. Both courts manipulated the facts for instrumental purposes, and systematically denied veterans their due process rights in order to prevent the veterans from presenting their claims to a jury. The core strategy was to make a cheap collusive settlement between the defendant manufacturers and the lawyers representing present claimants, who admittedly had weak claims, in order to sell out the potentially far stronger claims of all future claimants with whom the settling lawyers had a conflict of interest. Judge Weinstein suggested that there would have been no settlement at all if the future claims were not settled at the same time as the present claims. 781 F.2d at 919.

In order to make such a collusive global settlement of future claims, the courts had to, among other things, avoid an outright dismissal of the earlier and weaker claims. Instead the very weakness of those claims was an incentive for the lawyers who had brought them to sign a cheap settlement agreement sacrificing the future claims, who the settling lawyers did not represent, in exchange for money for the probably worthless present claims, which they did represent. The risk of the court dismissing all present claims and leaving these lawyers with no recovery at all from which to extract fees provided sufficient incentive for them to agree to a collusive sell out of future claims.

This strategy explains Judge Weinstein's refusal to dismiss outright on grounds of the government contractor defense prior to settlement. Otherwise the manufacturers

would have had no apparent reason to put some money on the table for these lawyers' settlement of future claims. If Judge Weinstein had dismissed the claims before forcing a settlement, it was clear that future Agent Orange claims would be brought in state and federal courts around the country that would be beyond his reach, and beyond the reach of such a global settlement. *See In re Agent Orange Product Liability Litigation,* 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) (no federal question jurisdiction over Agent Orange claims).

Accordingly, far from disserving petitioner's interests, as petitioners now claim, the judicial inconsistencies that attended settlement were necessary to protect the manufacturers against future claims. Judge Weinstein had to maintain the pretense that he was going to allow the case to proceed to trial in order to conclude a settlement of all present and future claims. Had he simply dismissed the claims before him for lack of sufficient evidence this would not have stemmed the flow of cases. Eventually, as Judge Weinstein predicted, there would have been evidence supporting future claims sufficient to reach a jury. At that point, all of the 250,000 or more claims on which the statute of limitations had not run would become valuable claims, vastly exceeding in worth the "nuisance value" global settlement.

The manufacturers' and Wall Street's justifiable satisfaction with Judge Weinstein's resolution of the Agent Orange litigation was reported widely in the popular and scholarly press. *See* Schuck, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (Harvard U. Press, Cambridge: 1987) 166. In fairness hearings, *see In re Agent Orange Product Liability Litigation*, 597 F.Supp. 746, 764-75 (1984), and elsewhere, the class settlement was broadly criticized by its nominal beneficiaries for being imposed upon them against their will, through lawyers they did not hire and who secured their own fees at the cost of selling out the veterans' claims, for too little, too late. *E.g.* Shuck, *supra*, at 179 (noting "overwhelmingly negative views of veterans about

settlement").

Judge Weinstein's role in imposing the settlement has also been criticized in academic commentary. For example, Professor Schuck, an admirer of Judge Weinstein, discusses the "risk of procedural unfairness ... judicial overreaching and over-commitment" in the Agent Orange settlement, and concludes that, having a "firm commitment to a settlement almost entirely of his own creation .... [Judge Weinstein] could not fairly act as a judge in what, in a sense had come to be his own case." Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example,* 53 U.CHI. L. REV. 337, 362 (1986). Another observer concludes from a colloquium on the subject, "Judge Weinstein provides us with a public example of judicial coercion .... [H]is behavior was nothing short of outrageous." Warshawsky, *Objectivity and Accountability: Limits on Judicial Involvement in Settlement* 1987 U. CHI. LEGAL F. 369, 383, 386.

As shown above the outrage was against the veterans' interests, not the manufacturers' as the petitioners here would have us believe.

II. This Court Should Not Create New Law to Shift the Cost of the Unique Agent Orange Settlement to Taxpayers

A. It is Not "Unfair" to Leave the Cost of Defending Its Defective Product With Petitioners

"It simply cannot be the law" is petitioners' basic premise for their plea that this Court should correct the "profoundly unfair" result of the Agent Orange settlement. Br. Pet. 16-17. Their plea is profoundly misdirected.

The reason for the anomaly by which, a) the federal courts approved the government contractor defense in order to support a dismissal and a cheap class action settlement, while b) there was ample evidence for a jury to hold against petitioners on that defense, is explained above as the product of unorthodox result-oriented judicial tactics. In the judge-

made Agent Orange settlement, petitioners advantageously settled claims which by surface appearances they should have won on motion for summary judgment, or certainly at trial.

On deeper analysis, it becomes clear that if the veterans' due process rights had been observed by the federal judiciary, and the facts exposed, *see* House Government Operations Committee's Twelfth Report, *The Agent Orange Cover-up: A Case of Flawed Science and Political Manipulation,* H.R. Rep. No. 672, 101st. Cong. 2d Sess. (1990), the outcome would have differed. If only a fraction of the veterans' claims had reached a jury, petitioners could have lost many times their cost of settling the present and, more importantly, the anticipated future claims for injuries veterans suffered as a result of petitioners' defective product.

The trial court could not and did not force settlement terms on the petitioners. At worst, petitioners would have had to put their defense to a jury. By making an unprecedented class action designation for tort claims, however, the District Judge acquired direct control over the appointment and fees of class counsel, and authority to impose an unwanted collusive settlement that was primarily of benefit to the defendant manufacturers and the colluding lawyers. Rule 23 of the Federal Rules conveyed very real powers to impose a settlement on "class members," as defined by the judge, against which such "members" were powerless once they discovered their unwanted status.

Petitioners seek to characterize their Agent Orange settlement expense as if it were an inequity to themselves. Arising haplessly from "the realities of litigation," Br. Pet. 22, they argue, their loss should now be made good by the taxpayers.

Petitioners admit that their success at trial, had they not settled, was "far from certain." *Id.* Had due process been observed, and—as Judge Weinstein expected in *Ivy*—juries found against petitioners on their contractor's defense, and awarded damages, petitioners would have had no basis to ask this Court to allow recourse against the government for any

supposed inequity arising from such "realities of litigation." No arguable authority exists for shifting the cost of third party liability claims to the government where the contractor cannot satisfy the minimal conditions of any version of the government contractor defense. All versions of the defense viable in 1984, *see* Br. Pet. 20-21 & n.6, protected all contractors who are not at fault. Similarly the *Spearin* doctrine does and should indemnify only damages for which the government's "defective specifications," Br. Pet. 26, not the manufacturers' processes, are at fault. The United States is not a liability insurer that implicitly indemnifies damages that are legally found to have been caused by the negligence of its contractors.

An enormous gift from the federal judiciary to petitioners of a cheap global settlement, that also harnessed all future Agent Orange litigation to a single favorably disposed judge, prevented a potentially catastrophic loss for petitioners. This gift was, in a sense, insurance against any future liability to the veterans on account of future injuries, that still have not been all counted. The payment petitioners made to the court for this insurance can support no greater argument for indemnity by the United States than would the loss itself against which it provided effective insurance.

There is no equity or fairness in allowing petitioners to retain the benefit of buying their way out of facing a jury on a government contractor defense, a defense that had already been factually shredded by the Justice Department's pre-discovery Memorandum, J.A. 34, and then also provide petitioners an indemnification that must be premised on the assumption that they would have won this defense.

Such a rule would also constitute poor public policy in that it would remove any deterrent against contractors who produce dangerously defective goods for use by the military.

B. Petitioners' *Amici* Add to Their Argument Only A Scent of Impropriety

To lend further superficial support for the appearance of injustice petitioners proffer, they have procured the assistance of two *amicus* briefs. Little needs be said of the Chamber of Commerce *amicus*, and its members' motivation for supporting petitioners' efforts to obtain reimbursement from the government for the cost of corporate wrongdoing. Their brief is premised on an anecdotal understanding of the facts and hence addresses a straw man case, not this one.

It is necessary, however, to address the brief of the second *amicus*, the National Veterans Legal Services Program ("NVLSP"), which appears to speak on behalf of veterans. This organization is not a chartered veterans service organization and does not claim to speak for any such organization. It is a group of lawyers who served, not the broad interests of Agent Orange victims, but their own interests in gaining access to substantial funds made available to them from the collusive settlement.

In its Statement of Interest, NVLSP claims it has been involved in obtaining "compensation through ... judicial remedies," for Agent Orange veterans. NVLSP Br. at 2. But it has not tried to obtain a fair judicial remedy for the veterans' claims against the manufacturers who caused the veterans' injuries. NVLSP has not been known to criticize the 1984 collusive settlement or to seek any alternative remedy against the manufacturers of Agent Orange in any forum. NVLSP did not even join the *amicus* brief filed in *Ivy* in support of the injured veterans by virtually every significant veterans' organization in any way interested in assisting the victims of Agent Orange. *Supra* p. 1.

The failure of NVLSP to seek remedies against those who caused the veterans' injuries is easily explained by the source of its funding. NVLSP received a large portion of its funding, more than $2.5 million, from a foundation financed by petitioners in this case and the other manufacturers of Agent Orange. *See* 781 F. Supp. at 923, 928. As the

principal beneficiary of this foundation, NVLSP has used this funding largely in pursuit of its effort, consistent with its position in this case, to divert attention away from the manufacturers and have the taxpayers, rather than the manufacturers, pay for any injuries caused by the manufacturers' defective product. Due to several doctrines that accord the government immunity from suit for such injuries, with sole recourse to an administrative tar baby, the Department of Veterans Affairs ("VA"), this endeavor of NVLSP was destined to be a largely futile exercise for the veterans as a whole. The limited gains toward this end have been made primarily through legislation commanding the VA to provide modest compensation to a few Agent Orange victims. Agent Orange Act, Public L. No. 102-4 (1991).

In exchange for their more than $2.5 million in grants from money provided, in part, by petitioners, NVLSP subjected itself to the condition that it "may not take a position on the [*Ivy*] case or Judge Weinstein's ruling [dismissing *Ivy*]. Nor may [NVLSP] express opinions as to the causal relationship between agent orange and any specific ailment or condition." Directive from AOCAP Foundation to AO Grantees, "Court Issues Ruling in Ivy Case," (E.D.N.Y. Oct. 4, 1991). By their 10 years' of paid silence these lawyers have sold out the interest of Agent Orange victims in obtaining a day in court on their claims against the manufacturers of Agent Orange.

Now, for the first time, NVLSP enters a case involving those responsible for producing Agent Orange and the injuries it caused. It is not surprising that NVLSP should enter such a case, not to support the interests of veterans, but rather to support the interests of those who caused the veterans injury. Though they kept quiet on instruction about the cause of the veterans' injuries when it might have aided the veterans' quest for justice, they now speak up in this forum too late to assist the veterans themselves.

No veteran will receive an additional penny if the petitioners succeed, with NVLSP's help, in recovering from

respondent the money they provided NVLSP and others in connection with the 1984 collusive class action settlement.

C. No Law Shifts a Contractor's Cost of Defending Third Party Tort Claims to Government

As raw material for fashioning a new doctrine that would fill an alleged lacuna in the law, petitioners invoke precedents that do not apply to the facts they have pleaded. Petitioners thus frankly seek the creation of a new remedy or a judicially implied contract provision requiring the government to indemnify them under the circumstances of this case.

It is no surprise that petitioners are unable to find supportive law or precedent on point. Their case depends on a highly fact-bound revisionist interpretation of the unique events surrounding the Agent Orange settlement, the like of which has not arisen in over two hundred years of government contracting. But the operation of such a new rule for this case could not be confined to the facts of Agent Orange.

A fortiori, if petitioners' settlement of veterans' claims not protected against by petitioners' contested government contractor defense should give rise to an implied contract for indemnification of their litigation expenses, every contractor who actually wins, rather than settles, a suit in which it raises a government contractor defense will also have an implied contractual claim against the government for their litigation expenses necessary to assert and win the defense.

Until the Westfall Act was enacted in 1988, the United States was not required to assume the cost of defending its own employees against third party claims arising out of their employment. *See Falkowski v. EEOC,* 783 F.2d 252 (D.C. Cir. 1986). There is no greater reason to imply such a requirement with contractors which, as business corporations having limited liability, are better able than are individual employees to limit, insure against, and externalize costs. Contractors also have greater bargaining power to obtain an express indemnity provision.

Where such an indemnity provision was expressly provided in the Department of Energy's contracts with producers of nuclear materials, administrative experience has not been good. The provision opened up opportunities to raid the treasury, and for that reason its use has recently been discontinued by the DOE. *See* GAO, *Managing DOE: Tighter Controls Needed Over the Department of Energy's Outside Litigation Costs* (T-RCED-94-264)(July 14, 1994). Expanding *Spearin* to create an implied indemnity clause in all government contracts for third party tort claims would cast across the whole range of government contracts the administrative can of worms experienced by the DOE.

Nothing prevents the government from contracting for such a provision in particular circumstances, such as it did in the context of the special dangers and urgency of the nuclear enterprise. But the Court would be treading on matters properly assigned to executive discretion and legislative power to now amend all government contracts to add such a provision.

Petitioners' suggestion that this provision would only apply to products requisitioned under the DPA does not make sense. First, as the court below held, the DPA framework expressly provides immunity from third party contract claims that arise from the contractor's forced prioritization of war production over existing commercial contracts. Since the DPA neither provides an indemnity remedy of any kind, nor even extends an immunity from tort claims, it is an inappropriate vehicle for such a major change in the law. Second, within this framework, the DPA expressly leaves manufacturers bargaining power over the "prices and terms of sale", and petitioners were therefore free to bargain for an indemnity provision. 32A CFR Ch. VI, DMS Reg. 1, Dir. 3 §3(b)(3)(1959); *id.* BDSA Reg. 2 §10(c)(1) (1953). Nothing in petitioners' pleading indicated that they had attempted to do so, and were subsequently denied an express indemnity as a condition of sale.

CONCLUSION

Petitioners posture as victims when in fact they victimized veterans twice. First they negligently contaminated their herbicide with dioxin, a highly toxic chemical that was not included in the design specifications. Second, they procured a collusive settlement by which they escaped potentially enormous liability to the veterans, with the cooperation of the federal judiciary.

Federal courts justified the settlement with rulings on fact issues that, however erroneous, effectively imposed a sell-out settlement on unwilling veterans for the benefit of petitioners. These courts denied veterans a jury trial on dispositive fact issues by dictating that no veteran could win an Agent Orange claim. Petitioners, who benefited enormously from them, should now be as bound by those rulings as are the veterans. If no veteran could win an Agent Orange claim, then there was no reason for petitioners to have settled their claims, and no grounds to request indemnification from the government for that settlement. Petitioners should be estopped from arguing otherwise.

That these rulings were, in fact, part of a series of transparent devices to obtain a settlement at a very cheap cost, and that without these payments petitioners would have been liable for enormous damages does not provide an occasion to plead for a new government indemnity.

For these reasons, the decision of the Court of Appeals for the Federal Circuit should be upheld.

Respectfully submitted,

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